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No. 676.

In the

Supreme Court of the United States.

October Term, 1914.

DANIEL A. McDOUGAL, - - - *Plaintiff in Error,*

vs.

EDMOND McKAY, et al., - - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Reply Brief of Counsel for Defendants in Error.

GEO. S. RAMSEY,
EDGAR A. de MEULES,
Counsel for Defendants in Error.

INDEX

Pages

STATEMENT OF FACTS..... 1 to 3

Disputed question of law stated..... 3 to 5

The land in question was allotted to the heirs of Andrew J. Berryhill, and while the heirs take by purchase technically, yet the Arkansas law of descent should be applied just the same as if the heirs of Andrew J. Berryhill had actually inherited the allotment. Point discussed..... 5 to 38

There should be no difference in the application of the Arkansas law of descent to a case where the heirs take by purchase technically, instead of by actual descent—discussed from .... 5 to 38

The heirs take per stirpes and not as a class per capita—discussed with cases and authorities cited ..... 5 to 38

The allotment of a Creek citizen is not a new acquisition under the Arkansas law, but in the nature of an ancestral estate, his allotment being his birth-right, and his right to the same being acquired by virtue of being a member of the tribe—discussed from .....38 to 65

Under the Arkansas law of descent it becomes necessary to determine whether or not the estate is ancestral or a new acquisition when there are no descendants—when the allotment passes in the ascending line it is absolutely material to first determine whether the estate is ancestral or new in order to discover the course of descent, that is, whether to the maternal or paternal side, but this is immaterial so long as there are descendants.....40 to 47

And especially see page 45

To allot the lands of an Indian Tribe among the citizens thereof is not the grant or donation of a new title, but is more in the nature of a partition of prior rights—authorities cited ....56 to 62

Pages

That an allotment is not a new acquisition and not analogous to the acquisition of title to the public domain of the United States, see opinion of the Eighth Circuit Court of Appeals in Shulthis v. McDougal, quoted from and discussed on pages .....47 to 51

As said by this court in Worcester v. Georgia, "To contend that the word 'allotted' in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged would . . . do injustice to the understanding of the parties".....56 and 57

Indian allottees are not donees of the Government.....58 and 59

Brief of John B. Meserve, Amicus Curiae, replied to....65 to 70

TABLE OF CASES.

Pages

Brown v. Belmarde, 3 Kan. 35..... 6
Bassett v. Granger, 100 Mass. 348.....18
Baskin's Appeal, 3 Pa. St. Rep. 304.....23
Bailey v. Bailey, 25 Mich. 185.....31
Beecher v. Wetherby, 95 U. S. 517.....57
Beam v. United States, 162 Fed. 260.....58
Campbell v. Wiggins, Rice's Eq. 10, (S. C.).....28
Cherokee Nation v. Hitchcock, 187 U. S. 294.....51
Const. & Laws of Muskogee Nation by McKellop, 57.....53, 54
Choate v. Trapp, 224 U. S. 671.....62
Duffy v. Hargan, 50 Atl. 678.....11
Dunlap's Appeal, 9 Atl. 936.....25
Dukes v. Faulk, 37 S. C. 255, 34 Am. St. Rep. 745.....28
Delaware Indians v. U. S., 193 U. S. 129.....51
Davison v. Gibson, 56 Fed. 443.....54
France's Estate, 75 Pa. St. 220.....25
Forrest v. Porch, 45 S. W. 676 (Tenn.).....30
Fleming v. McCurtain, 215 U. S. 56.....51
Fairbanks v. U. S., 223 U. S. 215.....63
Goat v. U. S., 224 U. S. 458..... 9
Harvey v. Beach, 38 Pa. 500.....11
Houghton v. Kendall, 7 Allen (Mass.) 72.....17
Holbrook v. Harrington, 16 Gray, (Mass.) 102.....22

INDEX—Continued.

Pages

Henry v. Thomas, 20 N. E. 519....32
Hockett v. Alston, 58 S. W. 675....55
Hockett v. Alston, 110 Fed. 910....55
Jones v. Meehan, 175 U. S. 1.... 9
Johnson v. Bodine, 79 N. W. 348....32
James v. Smith, 58 S. W. 715....55
Johnson v. McIntosh, 8 Wheat. 543....57
Kendall v. Gleason, 152 Mass. 457....18, 20
Kelly v. McGuire, 15 Ark. 555....39-47
Lipman's Appeal, 30 Pa. St. 180....25
Lott v. Thompson, 15 S. E. 278, (S. C.)....29
Lawton v. Corlies, 27 N. E. 847....34
Ligon v. Johnston, 164 Fed. 670....51
Mullen v. Read, 64 Conn. 240, 42 Am. St. Rep. 174....17
Minter's Appeal, 40 Pa. St. 114....24
Minnesota v. Hitchcock, 185 U. S. 396....56
Martin v. U. S., 168 Fed. 205....62
Nivens v. Nivens, 64 S. W. 604....55
Parr v. U. S., 153 Fed. 462....59
Russell v. Hall, 101 U. S. 503.... 8
Reynolds v. Fewell, 236 U. S. 58....12
Rand v. Sanger, 115 Mass. 124....18, 22
Ruggles v. Randall, 38 Atl. 885....29
Richards v. Miller, 62 Ill. 417....31
Rush v. Thompson, 53 S. W. 333....55
Sizemore v. Brady, 235 U. S. 441.... 3
Shulthis v. McDougal, 170 Fed. 530.... 5, 47
Shulthis v. McDougal, 162 Fed. 331.... 5
Sweet v. Dutton, 109 Mass. 589....18
Sheetz's Appeal, 82 Pa. St. 213....25
Stephens v. Cherokee Nation, 174 U. S. 445....51
Spalding v. Chandler, 160 U. S. 394....59
Templeton v. Walker, 55 Am. Dec. 646....28
Thorn v. Cone, —Okla.—....65
United States v. Cook, 19 Wall. 591....57
Washington v. Miller, 235 U. S. 422.... 5
White v. Stanfield, 146 Mass. 424....18, 19
Wood v. Robertson, 15 N. E. 457....32
Woodward v. James, 22 N. E. 150....34
Wilson v. Owens, 86 Fed. 572....55
Worcester v. Georgia, 6 Peters, 515....56

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR.

May It Please the Court:

The following facts present the issue of law in this case:

1. Andrew J. Berryhill was born in May, 1901.

2. He died in November, 1901.

3. Being the child of a duly enrolled citizen of the Creek Nation by blood, to-wit, the father, the Dawes Commission, under the authority of section 7 of the Supplemental Creek Agreement (32 Stat. L.

500), enrolled the name of Andrew J. Berryhill as a Creek citizen by blood, said section 7 of the Supplemental Agreement being as follows:

> "All children born to those citizens who are entitled to enrollment as provided by the Act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

4. He left surviving, his father, George Franklin Berryhill, a duly enrolled Creek citizen by blood, and his mother, Clementine Berryhill, a non-citizen of the Creek Nation.

5. Andrew J. Berryhill, the deceased, was enrolled as a Creek citizen on October 8, 1902.

6. The land in question was allotted in his name in 1904, and patents were issued to the heirs of Andrew J. Berryhill in October, 1905.

7. The father, claiming to be the sole heir, executed, on June 5, 1906, a deed to Edmond and Perry McKay, and thereafter, and on August 9, 1910, Edmond and Perry McKay deeded an undivided one-third interest to John V. McKay. Edmond, Perry and John V. McKay, with Albert W. Shulthis, their

oil and gas mining lessee, are the defendants in error in this case.

8. The plaintiff in error claims the title in fee through conveyances executed to him along in August, 1907, by the uncles and aunts of the deceased, Andrew J. Berryhill, admitting, however, that the surviving father, George Franklin Berryhill, inherited an estate in said land for his lifetime.

9. It is conceded that the Arkansas law of descent, as put in force by section 6 of the Supplemental Creek Agreement, under consideration by this court in *Brady* v. *Sizemore,* 235 U. S. 441, controlled the devolution of the one-hundred-and-sixty-acre allotment.

Controversy.

The dispute revolves around the construction *and application* of section 2531 of Mansfield's Digest of the Laws of Arkansas, being section 10 of chapter 49 of Mansfield's Digest. Plaintiff in error contends that the one hundred and sixty acres should be treated as a new acquisition, and that under section 2531 of Mansfield's Digest, the father acquired an estate for his lifetime, the fee, subject to the father's life-estate, passing to the uncles and aunts of the deceased Andrew J. Berryhill. It is our contention that the estate was ancestral on the father's side, the mother being a non-citizen of the Creek Nation,

and that accordingly, the father took the entire fee simple title as the sole heir.

Andrew J. Berryhill having been born after July 1, 1900, and before May 25, 1901, was entitled to be enrolled as a Creek citizen, having survived May 25, 1901. If he had died prior to May 25, 1901, although born subsequent to July 1, 1900, he could not have been enrolled. If he survived May 25, 1901, his death after that date was immaterial, the allotment to which he was entitled would either be set apart to him while living, or to his heirs in case of his death, and section 7 declares that "the lands and moneys to which he would be entitled if living (meaning if living at the time he received an allotment some time after May 25, 1901) shall descend to his heirs as herein provided and be allotted and distributed to them accordingly." Of course having died prior to receiving his allotment his heirs took technically by purchase and not by technical inheritance. Nevertheless, we must resort to the Arkansas statute of descent to determine two things: *First*, who were the heirs; and, *second*, the shares and portions they acquired. It makes considerable difference as to whether we look to the Arkansas law to merely nominate the heirs where the allotment is made direct to the heirs, or look to the Arkansas law to ascertain the heirs and their shares and portions. If we look to the Arkansas statute merely to ascertain who the heirs are in a case like this where they take by purchase, and not technically by descent, the

heirs will take *per capita,* whereas, if we resort to the statute to name the heirs and fix their shares and portions, they will take *per stirpes.* There should be no difference in the application of the law of descent to heirs taking by purchase and heirs taking technically by descent, it being manifestly clear that the Creeks knew nothing about the difference in taking as to class *per capita* or by representation.

Point One.

Although the heirs of Andrew J. Berryhill did not technically inherit the land in question, yet the application of the Arkansas law of descent should be just the same in this case as if Andrew J. Berryhill had survived to receive his allotment and then died intestate.

The above proposition was held to be correct by the United States Court for the Eastern District of Oklahoma in 162 Fed. 331, and, likewise, by the United States Circuit Court of Appeals for the Eighth Circuit in *Shulthis* v. *McDougal,* 170 Fed. 530, involving another portion of this identical allotment of Andrew J. Berryhill. This court in *Washington* v. *Miller,* 235 U. S. 422, appears to have also taken this view. In holding that non-citizens were excluded under section 6 of the Supplemental Creek Agreement from taking as heirs in a case of actual descent, as well as where the land was allotted direct

to the heirs in the first instance, this court held in *Washington* v. *Miller, supra,* that the word "heirs" was used without any accompanying explanation of who was intended "but this evidently was because the word was intended to have the same signification as in section 7 and section 28 and therefore no further explanation was necessary."

See also *Brown* v. *Belmard,* 3 Kan. 35, the opinion in which supports our contention that the law of descent should be applied as if the deceased had lived to receive his allotment.

If the court doubts the correctness of the above point, we invite a consideration of the following argument:

It will not be controverted that Congress had the power and the option to pass an act, with the consent of the Creek Nation, conveying the title to this land to the heirs of Andrew J. Berryhill, in the same manner, in the same right, and in the same condition as if the land had actually passed to them, technically, by inheritance.

Whether they took technically by inheritance or by purchase is absolutely of no importance. When we examine sections 6 and 7 of the Supplemental Agreement it will be seen that no distinction was intended to be made in the rights and estates conferred upon heirs by purchase, from those conferred upon heirs by descent or inheritance, technically speaking. In determining who the heirs of Andrew

J. Berryhill are, and what title and estate they acquired, the court will look to the Arkansas statute of descent, just as if he had received this land as his allotment during his lifetime by patent from the Creek Nation and died intestate. There was no intention to differentiate between heirs taking by purchase under the treaties and heirs taking strictly by inheritance and by descent. The language of sections 6 and 7 makes it too obvious for dispute. Section 6 of the Supplemental Agreement says:

> "The provisions of the Act of Congress approved March 1, 1901, insofar as they provide for *descent* and distribution *according* to the laws of the Creek Nation, are hereby repealed, and the *descent* and distribution of land and money provided for by said act shall be *in accordance with* chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in the Indian Territory."

It not merely repeals the Original Agreement, but *substitutes* chapter 49 of Mansfield's Digest, and declares that the *descent* and distribution of land and money shall be *in accordance with* said chapter 49. Section 7, under which Andrew J. Berryhill was enrolled, provides that: "And if such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, *if living*, shall *descend* to his heirs as *herein provided*, and be allotted and distributed to them *accordingly*."

If it were intended by the lawmakers to give to heirs taking as purchasers a different estate from heirs by descent, technically speaking, *why provide for and require first the enrollment of such deceased as a citizen of the Creek Nation?* The answer to that is this: The lands were to be allotted in severalty by the Commission only to citizens whose names appeared upon the authenticated and approved rolls of citizenship. These rolls of citizenship made up the aggregate list of units to whom the lands of the Creek Nation were to be set apart and conveyed. The dead citizen *was* however the *unit of allotment* and so held by the Secretary of the Interior in a written opinion. Andrew J. Berryhill, the deceased, could not, technically speaking, be a grantee. Lands cannot be granted to a dead person. *Russell* v. *Hall*, 101 U. S. 53-14, 25 L. ed. 829. There was a reason for first placing the name of a dead citizen upon the rolls. In fact and in law a party was not a citizen of the Creek Nation until his name was enrolled by the Commission to the Five Civilized Tribes. The Commission had to look to the rolls in order to ascertain to whom to set aside an allotment. In this case no allotment was made until after Andrew J. Berryhill was enrolled as a citizen of the nation. The act plainly says: "The lands and moneys to which he would be entitled, if living, shall descend to his heirs." This shows that the heirs, while taking by purchase, technically speaking, were to take the allotment, however, by virtue of being "successors"

to Andrew J. Berryhill, deceased. Not only does the act plainly to say: "The lands and moneys to which he would be entitled, *if living,* shall descend to his heirs," but says: "shall descend to his heirs as *herein provided.*" How is it herein provided? Where is it *herein provided?* It is *herein provided* in section 6, just above section 7, where it is plainly provided that it shall descend "*in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas.*" Section 6 not only repealed sections 7 and 28 of the Original Agreement, but substituted in lieu of the Creek law, the Arkansas statutes, and said plainly, "and the descent and distribution of land and money provided for by said act shall be *in accordance with* chapter 49 of Mansfield's Digest." We concede that the word descend and the word descent are, technically, inappropriate where the citizen died before getting his allotment, but if they have any meaning it must be ascertained and given. *The words were not used inappropriately when the allottee died after having acquired the allotment during his lifetime.* Where a citizen selected his allotment during his lifetime, but died before the patent was issued, his heirs take by descent, and not by purchase. *Goat* v. *U. S.*, 224 U. S. 458; *Jones* v. *Meehan,* 175 U. S. 1. The words "descend" and "descent" were accurately and technically appropriate insofar as the estates of dead allottees obtaining their allotments during their lifetime is concerned. If Andrew J. Berryhill had received his allotment

during his lifetime, it would have, technically speaking, descended to his heirs and been inherited by his heirs in the strict, technical, legal sense of the word. The heirs, if he had died the owner of the allotment, would have been not only determined and nominated by the Arkansas statute, *but their shares and proportions would have been fixed and also determined by the Arkansas statute.* The conclusion, therefore, inevitably follows that Congress and the Creek Nation, under the provisions of sections 6 and 7, intended to convey to the heirs of any citizen dying before receiving his allotment, the same estate, the same share, and the same portion they would have taken by strict inheritance in the event he had lived to receive his allotment and then died seized of the allotment. It is certain that Congress and the Creeks *never had the slightest idea or intention of making any distinction or difference between the application of the Arkansas law of descent and distribution to a case of strict and technical inheritance and a case where the allotment passed to the heirs, as purchasers or as representatives of the deceased. Sections 6 and 7 are worded with a view to cover both classes of cases.* But a clear legislative intent is shown by the language of sections 6 and 7, to pass to the heirs where they take by purchase, the same estate and share, under the same conditions and in the same manner, as if the deceased had died seized and possessed of the land, leaving it as an inheritance. The act says: "The lands and moneys

shall descend in accordance with chapter 49 of Mansfield's Digest." "According to," and "according to law," are phrases of well-known import and meaning. If the act had said, "the land and money shall *go to or inure* to the heirs in accordance with chapter 49 of Mansfield's Digest," the result would be exactly the same. Where an act of the Legislature or a contract says a thing shall be done "according to" or "according to law," the thing or the law referred to is by implication carried *verbatim* into the act or contract. Chapter 49 of Mansfield's Digest of the Statutes of Arkansas should be read into sections 6 and 7 as if set out in *haec verba*. The law of descent should be applied as if he had lived to receive an actual allotment.

Some Authorities.

In a recognizance the obligor was recognized in a certain sum as bail, "according to act of assembly;" and the words "according to" must be construed as making the act of the assembly which fixes the condition of the recognizance part of the recognizance.

—*Harvey* v. *Beach*, 38 Pa. 500;
Words and Phrases, pages 84 and 85;
Duffy v. *Hargan*, 50 Atl. 678.

The domain of the Creek Nation was owned by the tribe as a political entity. The tribe in 1901, by the Original Agreement, consented to the allotment

of the lands among the citizens in severalty. Here, therefore, was a vast and valuable estate to be administered and wound up. The tribal government was practically emasculated in 1898. The Creek laws were abrogated in 1898, and the Creek courts abolished. 30 Statutes at Large 495, Secs. 26 and 28; *Reynolds* v. *Fewell*, 236 U. S. ..... This valuable landed estate of the Creek Nation went into process of administration, to be allotted among the beneficiaries, its citizens.

In the ninth annual report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1902, said report being drafted after the Act of Congress of May 27, 1902, and before the ratification of the Supplemental Agreement, the Commission uses the following significant words:

> "Should the Supplemental Creek Agreement fail of ratification by the tribe, the exigency will be in a measure met by the provisions inserted in this bill looking to the enrollment of Creek children, and to the descent and distribution of the lands and moneys of that tribe."

It was the purpose of the Commissioners as the representatives of the government to bring about an equitable distribution and an equitable equalization of the lands and moneys of all of the Five Civilized Tribes among their citizens, and this was the guiding star in making the treaties and the divisions of the property. The provisions contained in section 6 of the Supplemental Agreement providing for the en-

rollment of children born after July 1, 1900, was inserted in the Supplemental Agreement at the instance of the Commissioners for the Creek Nation and at their request and solicitude.

In the eighth annual report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1901, the Commission says in regard to the Original Agreement:

> "Certain portions of the agreement were not acceptable to the members of the tribe and approval on the part of the councilmen was given only with the understanding on their part that the agreement might be supplemented in a manner to correct inaccuracies and discrepancies and make clear those portions which appear ambiguous. It may be safely stated that the tribe as a whole desires that all children born up to and including May 25, 1901 (the date of the ratification of the agreement), be enrolled. Under the agreement ratified by them (that is, the Original Agreement) no child born subsequent to July 1, 1900, may be enrolled. In this and certain other particulars, it is believed that the agreement should be amended, and steps to this end will doubtless be taken in the near future."

In the preface of the eighth annual report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1901, in discussing the condition of affairs in the Five Civilized Tribes, the Commission says:

> "To allot them land upon any other principle than equality of value would remedy none

of the evils arising from the unequal distribution of land which have so long existed; while to apply this principle, as the law provides, involved one of the largest, most intricate and difficult undertakings in which our government has ever been engaged."

In every agreement made with each of the Five Civilized Tribes, and in the Curtis Bill passed in 1898, providing for the allotment of the lands, there is practically the same declaration that the lands shall be allotted among the citizens, "giving to each, as far as possible, his fair and equal share thereof."

In the preface to the ninth annual report of the Commission, for the fiscal year ending June 30, 1902, the Commission says, in speaking of the object and purpose of the United States and the work of the Commission:

"Debilitated governments, through the art of diplomacy, were to be bethroned; communal land holdings transmuted to individual ownership; the *bona fide* members of the tribes to be identified, and all with the least possible hazard to political and property rights. Through the legislative function, agreements which are to become law for the *administration of these estates* are negotiated. Through the judicial the right to participate as members of the tribes is adjudicated, and contentions between members involving the right to possession of given tracts are determined. Through the executive, the laws governing many matters affecting the property of the Five Tribes are administered."

In the tenth annual report of the Commission for the fiscal year ending June 30, 1903, on page 8, the Commission says:

> "Manifestly, two indispensable duties lay at the very beginning of the business. *First,* to determine who were the *bona fide* citizens or heirs entitled to inherit these properties; and, *second,* to take an inventory of the properties to be divided. When these two tasks had been performed as to any tribe, then only was it possible to begin the intelligent and *equitable division of its estate.*"

On page 9 of the same report the Commission says:

> "The work of determining the rightful citizens or heirs and of getting the properties into necessary shape for distribution was all indispensable preliminary work, and by far the greater part of the work to be done."

Thus it will be seen that an equitable equalization was the guiding star in allotting and distributing the domain and funds of the nation. *If heirs taking by purchase were to have a different estate from those taking by strict descent an equitable equalization was impossible.*

In the 7th section of the Supplemental Agreement it recognized this right to an allotment of 160 acres of land to "all children born to those citizens who were entitled to enrollment, as provided by the Act of Congress approved March 1, 1901, subsequent to July 1, 1900 (and up to May 5, 1901), and living

upon the latter date," requiring such children to first be enrolled upon the list of beneficiaries. This roll of beneficiaries and devisees was to be made by the Commission, we might say, as executors with the will annexed—that is, the treaty or agreement. This devise of 160 acres was made to every such child born after July 1, 1900, and living May 25, 1901. The will, that is, the agreement, declared that in the event such child had died prior to receiving the allotment, the same should pass to his heirs, "*in accordance with* chapter 49 of Mansfield's Digest of the Statutes of Arkansas."

With this analogy, let us turn to the numerous decisions of the courts defining the rights of devisees under wills, where the devise is made, we will say, to John, and in the *event of his death,* to the heirs at law of John. The courts have repeatedly construed such devises or bequests, and we believe the decisions construing wills devising property to A, or to the heirs of A, will furnish a correct solution of this problem and a correct construction of sections 6 and 7 of this Supplemental Agreement. The question therefore recurs: Shall we look to the Arkansas law to ascertain who the heirs are, and there stop, or shall we look to the Arkansas law to determine, *first,* who the heirs are, and, *second,* the share or portion taken by such heirs?

A devised 100 acres of land to the heirs of B. The heirs of B necessarily took by purchase.

With this statement, let us examine the decisions:

In *Mullen* v. *Reed,* 64 Conn. 240 (42 Am. St. Rep. 174), the Supreme Court of Connecticut had under consideration the effect and meaning of the words "heirs at law," as used in a benefit certificate of membership in the Bay State Beneficiary Association, wherein the association agreed "to pay to the *heirs at law* of said member, in sixty days after due proof of the death of said member, a sum equal to the amount received from one death assessment, but not to exceed five thousand dollars."

It is clear that the heirs at law of the member did not acquire by inheritance the sum agreed to be paid by said membership certificate. They would take said sum as first takers, that is, by purchase—in other words, as donees. They took just as the heirs of Andrew J. Berryhill took. The court said:

> "Heirs at law, when used in such an instrument, indicate an intent that such persons are to take in the *same manner,* and in the *same proportions* as if the property had come to them as intestate estate, unless the contrary intention appears."

The court cites and approves the Massachusetts cases, and especially *Houghton* v. *Kendall,* 7th Allen 72, wherein the Supreme Court of Massachusetts said:

> "In this commonwealth, we find no authority which would conflict with the adoption of the

construction which seems to us reasonable, that when the word 'heir' is used in the gift of personalty it should primarily be held to refer to those who would be entitled to take under the Statute of Distributions, and to indicate that they should take in the *same manner* and in the *same proportions* as if it had come to them as intestate estate of the person whose heirs they are called."

The court cited and approved the following cases, all of which we have read and find to fully sustain our contention:

Sweet v. *Dutton*, 109 Mass. 589;
White v. *Stanfield*, 146 Mass. 424, 15 N. E. 919;
Kendall v. *Gleason*, 152 Mass. 457, 25 N. E. 838;
Bassett v. *Granger*, 100 Mass. 348;
Rand v. *Sanger*, 115 Mass. 124.

Heirs, or heirs at law, technically, mean those succeeding by inheritance to the real estate of the ancestor. *Next of kin,* technically, mean those succeeding to the personal estate of the ancestor.

A great many decisions have discussed the intention of the testator when he used the words heirs, or heirs at law, when his will only disposed of personal property, and the decided weight of authority holds that in such cases the testator intended to have his personal estate pass to those nominated by the statute of distribution, instead of those nominated

as heirs by the statute of descent. It is not important in this case to go into a discussion of the distinction between heirs at law and next of kin as used by testators in their wills. Sometimes they are used interchangeably.

In *White* v. *Stanfield, supra,* the testator left in trust for his son the sum of ten thousand dollars, to be held by the trustee during the natural life of the son, to pay him the income thereof and to pay over the principal of said sum on his decease (the son's death), to his (son's) heirs at law. After discussing the question as to whether or not heirs at law meant those designated by the statute of descent or the statute of distribution, the will bequeathing only personal property and the testator having no real estate, the court said:

> "In the case at bar, those who are to take after the life estate do not take by way of succession or substitution, but as an independent substantive gift; but that which they were to take is personal property intended to be kept as such, and thus to be paid over at the decease of the life tenant, and, notwithstanding the use of the words heirs at law, it should be paid to his distributees, and one-half thereof to his widow, as a person so entitled *under the statute.* The words do not appear to have been used technically, nor would it have occurred to the testator unless his attention had been called to it by legal advice, that he was in danger by the use of them, of sending his *property* in a different direction from that it would have taken if it had actually been the *property of his son.*"

The court further said:

> "When a testator establishes a fund consisting of personal property for the purpose of providing an income for life for his son, and this is apparently his principal object, and when, after his son's decease, he directs it to be paid over to his *son's heirs at law,* his intention is not so much to make a bequest of it, or direct further how it shall go, as it is to *surrender* the disposition of the fund, *as if it were actually the son's,* to those upon whom the law would in such case devolve it."

The court then held that it passed to those nominated by the statute of distribution in the *same manner* as if it had been the property of the son during his lifetime, and in the *same share and portion prescribed by the statute,* just as the lawmakers intended the heirs of Andrew J. Berryhill to take—that is, in the *same manner,* and in the *same share and same portion, as if the allotment had been set apart to Andrew J. Berryhill during his lifetime.* The words of the statute make this plain.

In *Kendall* v. *Gleason, supra,* the testator devised certain property to trustees, who were to permit his three sons to occupy it. At the request of either of the sons the trustees were to have the property appraised and conveyed to any two of them who should wish to purchase at the appraised value, and if no two wished to purchase, the trustees were to sell the property. If the sons could not agree, the trustees were directed to sell the property and invest

the proceeds, one-third of which was to be paid to each son upon his arrival at the age of fifty years. The following language is worthy of note:

> "If either of my sons shall die before arriving at the age of fifty years, I direct his share to be paid by my said trustees to his legal heirs."

This is very similar to the language of the statute in question, wherein it is provided:

> "And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to *his heirs* as *herein provided,* and be allotted and *distributed* to them *accordingly.*"

One of the sons died before reaching the age of fifty. The court said:

> "On the death of Stillman A. Gleason, the trust terminated as to his share, which fund immediately became payable to his *legal heirs.* The will contemplated a change of the *real estate* to personal property in the hands of the trustees, and that it should go to the heirs in the form of personal property. The words legal heirs must therefore be construed to mean those who would take personal property under the statute of distribution. One-third of the fund held by the trustees should be paid to the heirs of Stillman A. Gleason, in the *proportions* of one-third to his widow, Mary E. Gleason, and two-thirds to his minor son, Benjamin W. Gleason, whose share will be held by his guardian."

In other words, the court not only looked to the statute to determine who the heirs were, or who the distributees were, but the share and portion taken by each. The heirs of Stillman A. Gleason, the son of the testator, did not take by inheritance from the testator but took as donees, that is, by purchase, and yet the Supreme Court of Massachusetts in that case, as well as in many others, went to the statute, not only to determine who the heirs were, but also the share and portion taken by each.

In *Holbrook* v. *Harrington et al.*, 16 Gray, 102 (Mass.), the Supreme Court of Massachusetts said:

> "A devise to heirs, whether it be to one's own heirs or to the *heirs of a third person*, designates not only the persons who are to take, but also the manner and proportions in which they are to take; and when there are no words to control the presumption to the will of the testator, the law presumes his intention to be that they shall take as heirs would take by the rules of descent."

In *Rand* v. *Sanger*, 115 Mass. 128, the court said:

> "The devise to heirs designates not only the persons who are to take, but also the *manner* and portions in which they take. Where there are no words to control, the law presumes the intention of the testator to be that they shall take as heirs would by the rules of descent. In the case at bar it does not sufficiently appear from the terms of the will that it was the intention to use the words '*my legal heirs*' in any other than a strict legal sense, and the rule must

be held to apply in determining who are to take. The general rule must also apply in determining the *proportions* in which the heirs shall take."

The Supreme Court of Pennsylvania in a large number of cases held that a devise to the heirs of the testator or to the heirs of a third person refers to the law of descent and distribution to determine two things: *First,* who the heirs are; and, *second,* the quantity and proportion of the estate taken by them. In *Baskin's Appeal,* 3rd Pa. St. Rep. 304, the court had under consideration a will wherein the testator directed: "Then my will is, that the remaining part of my goods, stock, etc., shall be impartially appraised, and after such appraisement is made, the same shall be equally divided between all the heirs." The court says:

> "We are of the opinion that the testator has reference to the *intestate* laws, by which his estate will be divided among his children and grandchildren *per stirpes.* After making certain bequests, he directs the remainder of his goods, stock, etc., to be appraised and equally divided among the heirs. By these expressions, he meant, his own heirs, which can only be ascertained by resorting to the statutes of distribution, as has often been done in analogous cases; and, taking this to be the rule, it descends to the children and grandchildren *per stirpes.* This shows the persons *who are to take,* and the same rule must be applied to *quantum* of the estate."

In *Minter's Appeal*, 40 Pa. St. 114, the court had under consideration a will wherein the testator says:

> "The balance and residue of my estate I order and direct my executors to divide equally, share and share alike, amongst the children of my brother, Adam Minter, deceased, and the children of my brother Martin G. Minter, and to my sister, Barbara Savol. It is my will that said Barbara and the children of said brothers, Adam Minter and Martin G. Minter, shall have the residue of my estate, share and share alike."

The testator died 1858 unmarried and without issue, leaving two children of his brother Adam and fourteen children of his brother Martin G. Minter, and two children of his sister, Barbara Savol, who had died about eight years before the date of the will. There were others, nephews and nieces, the children of his deceased brothers, Michael and Henry, to one of whom he gave a legacy of $210. The legacy to Barbara Savol would have lapsed except for a statute passed by the legislature of Pennsylvania in 1844, which saved the bequest to the testator's sister, Barbara Savol from being void, though she had died before the will was written, leaving children surviving the testator. The court said in passing on this case in regard to what estate the heirs of Barbara Savol would take:

> "When we find a man distributing his estate, in whole or in part, among his next of kin, and he leaves the proportions in which they are to take doubtful, it is quite natural for us to

suppose that he had the statutory or customary form of distribution in his mind, and to interpret his will accordingly. This would classify the legatees as he seems to have done, and as the court below did, and allow the *three classes* to take as their parents would have done; thus, they, themselves, take by *quasi* representation and *per stirpes.*"

The court held that the children of Barbara Savol took the share she would have taken if she had been living at the date of the death of the testator and had died intestate.

In *Dunlap's Appeal*, 9th Atl. Rep. 936 (Pa.), the court said:

> "Where a man gives the whole or a part of his estate to his next of kin and leaves the proportions doubtful, it is natural to suppose that he had the statutory form of distribution in mind, and to interpret his will accordingly."

A large number of Pennsylvania cases have held that where the proportion is doubtful under the terms of the will the intestate laws will govern:

Sheetz Appeal, 82 Pa. St. 213;
Lipman's Appeal, 30 Pa. St. 180;
France's Estate, 75 Pa. St. 220;
Fissel's Appeal, 27 Pa. St. 55.

The Supreme Court of South Carolina, in Third Richardson's Equity, 543 (55 Am. Decisions 646), discussed at length a devise or bequest to *heirs* or heirs at law. This opinion is worthy of diligent consideration, inasmuch as it discusses the English and

American decisions on the question and overrules some former decisions of the courts of South Carolina. Believing that the court will read this discussion in full, we will not quote very extensively from it. Among other things, however, the court said:

> "Whatever may be the doctrine of the English cases on this subject, the state of our law and of *public policy* justify the rule that whenever we are compelled by the terms of description in a devise or grant, to resort to our statute of distributions for the purpose of ascertaining the objects of the gift, *we must also resort to the statute to ascertain the proportions in which the donees shall take, unless the instrument making the gift indicates the intention of the donor that a different rule of distribution shall be pursued.*"

The court further said:

> "In the case under consideration the Court of Appeals in equity could not have attained the conclusion that the 'heirs of the body' of the tenant for life took as purchasers, within the rules as to the remoteness of limitation, otherwise than by construing these terms to mean the descendants of the tenant for life living at the time of her death, or something equivalent. No one can take as heir of the body of another unless he fulfills the description, and is not only such a person as would take the real estate of that other under our act of distributions, but likewise a lineal descendant. As we are obliged then, to ascertain from the statute of distributions *who are the heirs of the body*, it is a logical consequence that we should look there also to

ascertain their share in the subject of gift. The statute is the exponent of the full meaning of the donor, unless he has declared a contrary intent, which is not pretended in the case before us."

In discussing whether heirs taking by purchase or as donees, take the shares and portions fixed by the statute, as we insist in this case, the court said:

> "It was strongly insisted in the argument of this case, that whenever several persons took as purchasers under one gift they must take *per capita,* and that no case could be found to the contrary. But where is the necessary connection between the ideas of *purchase and equality?* Surely a testator might provide for an unequal distribution among those taking by purchase; as by a gift to A and the three children of B, so that A should take one-half, or by a gift to C for life, and upon his death to his children then living, the eldest son of C taking one-half, however numerous such children may be. It is useless however, to suppose cases when examples may be found in books. In 2 Jarm. on Wills, 40, it is said:
>
> > 'The statute of distribution not only determines the object of a gift to "relations," but also regulates the proportions which they take, the gift being held to apply to the next of kin and the persons whom the statute admits by representation, the whole being taken *per stirpes* not *per capita;* that is, the property is distributable proportionately among the stocks, not equally among the several individual objects of every degree'."

The Supreme Court of South Carolina in a much later case decided in 1892, *Dukes* v. *Faulk*, 37 S. C. 255 (34 Am. St. Reports, 745), discussed the question as to what method of distribution or division should be made among a class taking as purchasers, where the devise was to the legal heir or heirs of the body, or kindred phrases, and expressly held that where it was necessary to look to the statute to determine who the heirs were, it was also necessary to look to the statute to determine the portions in which they should take.

The court said:

> "If, therefore, the gift is to a class of persons designated as heirs of a particular person, then, as it is necessary to resort to the statute to ascertain who are the individuals composing the class, resort must also be had to the statute to determine how or in what proportions such individuals shall take. This is upon the presumption that the donor, having by implication, at least, referred to the statute as to the persons who were to take, also intended that reference should be had to the statute to determine the proportion in which they should take, unless he expressed a different intention."

The court in this case quotes from *Campbell* v. *Wiggins*, Rice Equity 10, and other South Carolina decisions, and says that decision was much shaken in *Templeton* v. *Walker*, 55 Am. Decisions 646, and in effect overruled. In *Campbell* v. *Wiggins*, Rice Equity 10, the chancellor had under consideration

the question of what share goes to each heir under an Act of the Legislature granting certain land to the heirs of Wiggins, deceased, and held that as the heirs took by purchase they took equally, but that decision was overruled in the later cases cited above. See also:

Lott v. *Thompson*, 15 S. E. Rep. 278 (S. C.).

The Supreme Court of Connecticut, in 1897, held that a bequest to the heirs of testator's niece, who died before the testator, was a class gift, which on the death of the testator vested in the descendants of the deceased niece *per stirpes.*

—*Ruggles* v. *Randall*, 38 Atl. Rep. 885.

The Supreme Court of Tennessee in 1898 had under consideration a will containing the following clause:

> "I give and bequeath to my beloved wife, Ollie C. Reese, a certain tract or parcel of land containing, by estimation, about 120 acres, and bounded as follows: * * * To have and to hold as long as she lives, at her death the said land is to be divided between my *heirs at law.*"

The court said:

> "This is an explicit devise of the land to the widow during her life, with the remainder in fee to the heirs at law of the testator. The chancellor treated the remainder as vested, but the Court of Chancery Appeals was of the opinion that it was contingent. We concur in the latter view. The remainder was contingent, because the testator obviously intended the land to be

divided *at the death of his widow* among such persons as should then sustain to him the relation of heirs at law. The remainder-men are to be ascertained, not at his death, but at the death of his widow, the life tenant; *and they are to be such persons as should at that time be his heirs at law.*"

The court further said:

"In what proportion do the remainder-men, when ascertained, take the land? The chancellor held that they take *per stirpes,* according to the statute of descent; and the Court of Chancery Appeals held that they take *per capita,* share and share alike. On this question we concur in the holding of the chancellor. When the testator directed that the land should be divided among his heirs at law, he meant that the persons falling within the description should take *as heirs at law would take.* The phrase *heirs at law* indicates who shall take, and *how they shall take.*"

—*Forest et al.* v. *Porch et al.,* 45 S. W. Rep. 676.

The Supreme Court of Michigan had under consideration a will providing for a life estate free from taxes, to be held by the testator's widow, in land to be paid for out of his other estate, and also gave her an annuity payable regularly after his decease, and made all of his other property, real and personal, subject to disposal, if necessary, to meet that and other charges; and then, after providing for certain other persons, left the "residue of his estate to *de-*

scend to his lawful heirs according to law." The court held that leaving it to descend to his lawful heirs according to law means simply,

> "that the heirs who appear to have been in different degrees of consanguinity should take their *shares* in the order of representation prescribed by the statute."
>
> —*Bailey* v. *Bailey*, 25 Mich. 185.

The Supreme Court of Illinois had under consideration the following clause in a will: "I give, devise and bequeath to my heirs at law the remainder of my estate." The court said in construing this:

> "We must invoke the aid of the statute to determine the persons who constitute the class. When invoked to determine the persons to take, we must follow its provisions as to the *quantity* they shall take."

The court said further:

> "The persons to take, and the proportions, must be determined by the statute of distribution."
>
> —*Richards* v. *Miller*, 62 Ill. 417-426.

The Supreme Court of Iowa had under consideration a will containing the following clause:

> "It is my will that at the death of my brothers, Isaac J. Lester and Garra Kimball Lester, that my entire estate, both real and personal, be divided between my heirs at law."

The court, among other things, said:

"The court is of opinion that, according to the established rule of law, a devise to heirs, whether it be to one's own heirs or to the heirs of a third person, designates, not only the persons who are to take, but also the *manner* and *portions* in which they are to take, and that when there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they shall take as heirs would take by the rules of descent."

—*Johnson* v. *Bodine*, 79 N. W. Rep. 348.

The Indiana cases are in line with this holding. See:

Henry v. *Thomas*, 20 N. E. 519;
Wood v. *Robertson*, 15 N. E. 457.

The Supreme Court of Indiana in these two cases cite and approve the Massachusetts and Pennsylvania cases, and also the New York cases, which will be hereafter mentioned.

The Court of Appeals of New York has had this question under consideration, and in cases which we believe are not only well considered, but absolutely in point. In one case that court had under consideration a will wherein the testator who left surviving him only his wife and collateral relatives, gave to his wife one-half of the income of all of his property for and during her life "without restraint, deduction or interference of any kind," and gave the "remaining of the income accruing during her life,

after payment and discharge of all taxes, assessments and charges, and the reversion after the death of his wife, to his *legal heirs.*"

The court said:

"The remainder was devised and *bequeathed to his legal heirs,* but in the manner and under conditions manifesting a very decided purpose to *postpone* their estate in remainder until the death of his wife."

The court further said:

"We are thus required to determine who the testator meant by *legal heirs,* and whether he intended to designate by that phrase the individuals merely who should take, or to fix also the *quantity of estate* which should devolve upon each. If he used the words legal heirs solely to identify individuals who were to take as devisees, they would be deemed in general to take as purchasers, *as if all had been named,* and in the absence of any modifying language of the will, would take as tenants in common and *per capita. That, of course, assumes that the interest devised is in some way different from that which would have descended had no will been made.* But the testator, I think, himself indicated the sense in which he used the phrase, and what he meant by it. Where he declares the consequences of the forfeiture of any share, he uses this language: 'The share that would otherwise have gone to him or her shall be divided among the remaining heirs according to law.' This undoubtedly means according to the law which governs in a *case of intestacy.* It evidently respects the *quantity of interest,* as well

as the persons who are to take; for the division —that is, the proportion—is to *be according to law.* This language tends to explain the meaning of the testator in the use of the word heirs in the devise of the remainder. It is qualified by the word legal, which seems to have been used in the same sense and to express the same idea as the phrase *according to law.*"

The court then held that the remainder-men should take as in case of intestacy, and so *per stirpes.*

—*Woodward* v. *James*, 22 N. E. Rep. 150.

It is well here to return to sections 6 and 7 of the Supplemental Agreement, putting in force the Arkansas law, and again note the language, wherein the statute says:

"And the descent and distribution of land and money provided for by said act shall be *in accordance* with chapter 49 of Mansfield's Digest."

And in section 7, where the statute says:

"And if any such child has died since May 25, 1901, or may hereafter die, before receiving his allotment of lands and distributive share of the funds of the tribe, the land and moneys to which he would be entitled, if living, shall descend to his heirs as *herein provided,* and be allotted and *distributed to them accordingly.*"

In *Lawton et al.* v. *Corliss,* 27 N. E. 847, the Court of Appeals of New York had under consideration a will containing the following clause:

"I order and direct that my estate be divided among my heirs at law *in accordance with* the laws of the state of *New York,* applicable to persons who die intestate, and that no bond or security whatever be required of my executors hereinafter named in the settlement of my estate, real or personal."

It will be noticed that the language of this will is almost identical with a part of the language of the Supplemental Agreement wherein it says:

"Divided among my heirs at law in accordance with the laws of the State of New York."

The Supplemental Agreement says:

"The descent and distribution of lands and moneys provided for by said act shall be *in accordance with* chapter 49 of Mansfield's Digest."

In considering this will the court said:

"The use of the words heirs at law in such a connection indicates, as I think, the legal heirs, in the sense of persons who would legally succeed to the property in case of intestacy, according to its nature or quality, the heirs at law taking the realty and the next of kin the personalty. The cardinal idea seems to be that the division should be in accordance with the statute in case of intestacy. This, as was said by the general learned term, seems to be the plain import of the language used by the testator, giving to the persons forming each of these classes whatever of the estate would go to them under the laws of the state. As already suggested, there is nothing to indicate any other

purpose. It is precisely as if the testator said: 'I do not intend that there shall be any dispute over my estate. I mean to declare that the persons who are recognized by the law of the State of New York as entitled to a portion of it shall have it to the *extent* that the law declares. My *real estate* shall be divided among those to whom it would descend, and my personal estate shall be divided between those who would be entitled to it, just as if no will had been made, and I make this will only for the purpose of securing the co-operation of the executors "whom I have named to take charge of my estate and protect it".' This construction is in conflict with no decision of this court to which our attention has been called, and is in accordance with the recent case of *Woodward* v. *James*, 22 N. E. Rep. 150, which we regard as controlling."

The court discussed the meaning of the words *according to law* and held that under the will those denominated by the statute as his heirs would take the real estate in the proportions prescribed by the statute just as if the deceased had died intestate—that is, they took *per stirpes*, and not *per capita*.

We believe these authorities are in point and furnish the correct rule of construction to be applied to Sections 6 and 7 of the Supplemental Agreement, putting in force Chapter 49 of Mansfield's Digest of the Statutes of Arkansas on descent and distribution. The lawmakers never intended to make any distinction between the heirs and their proportionate shares where the allotment was set apart to the heirs

after the death of the citizen, and the heirs taking by strict and technical inheritance the allotment of a deceased citizen who had received his allotment before his death. As heretofore pointed out, an equitable equalization in the allotment and distribution of the lands of the tribes was the guiding star. If we are to look to the statute of descent merely to determine who the heirs are in those cases where the heirs take by purchase, and not look to the statute of descent and distribution to ascertain their proportions and shares, then those heirs taking an allotment as donees, and not by strict and technical inheritance, would receive and obtain a different estate and a different share of the tribal lands than heirs taking strictly by inheritance. No distinction was ever intended, and we do not believe it would be just and equitable for the court to, by any fiction of law and construction, differentiate between the rights, equities, shares and proportions of heirs of Andrew J. Berryhill, had he received his allotment during his lifetime and died seized and possessed of the same.

As said by the Commission to the Five Civilized Tribes in their annual reports, heretofore referred to, the lands and moneys of the Creek Nation constituted a vast and valuable estate to be administered upon and allotted and distributed to the beneficiaries named in the original and supplemental treaties.

Point Two.

In applying the Arkansas Law of descent the land in question should be treated and considered as an ancestral estate coming from the paternal side, and, therefore, inherited by the father under section 2531 of Mansfield's Digest.

The Arkansas law of descent can not be made to fit with technical precision the descent of an Indian allotment. If the contention of plaintiff in error prevails it will be difficult to obtain a title to inherited lands in the Five Tribes, because if the allotment is treated as a new acquisition the father will have a life-estate and then at his death the mother gets a life-estate, with the fee passing to collateral kindred, uncles, aunts, cousins and other remote relatives according to their proximity to the deceased, and the court will see at a glance that such a condition ought not to exist. It complicates titles, whereas, the construction contended for by us narrows the line of descent to those most equitably entitled, the father and mother. Besides, in the Five Tribes, on account of the lax marriage relations of the members, it is not easy by any means to ascertain who are the collateral kindred, and no man knows when he has all the heirs, and as a consequence of this uncertainty, no one will pay anything like the real value for the land if the allotment is to be treated as a new acquisition and pass in fee to collateral kindred with a life-estate first to the

father, and, second, to the mother, as contended for by plaintiff in error.

The decisions of the Supreme Court of Arkansas show that in the absence of *descendants,* it becomes material to determine first: The source from whence the estate came before the heirs in the *ascending* line can be nominated, and their shares and portions fixed and determined. In other words, the Supreme Court of Arkansas has expressly decided in numerous decisions that the father and mother are not heirs—that is, they cannot take real estate under section 1 of the chapter, unless the estate is *either ancestral or a new acquisition.* Although the estate may be ancestral the father is not an heir unless the estate came to the deceased from the father's side—that is, unless "the estate come by the father," or from the father's side of the house. If the estate came by the mother, the father took absolutely no estate by inheritance. If the estate was a new acquistion, only a life estate. So far as the personal property is concerned, it is immaterial from whence the property was derived or from what source it came to the deceased. But it is different with real property; it is immaterial, insofar as real property is concerned, as long only as there are *descendants,* but in the absence of *descendants* it becomes necessary to determine the source from which the estate came to the deceased.

Let us first examine the celebrated case of *Kelly* v. *McGuire,* 15 Ark. 582.

In discussing section 1, out of which we contend the father is carved as an heir by section 10, the Supreme Court of that state said:

> "The first section is general and comprehensive, embracing all lands, whether ancestral or newly acquired, *subject to certain exceptions and qualifications*, hereafter more particularly noticed, and these exceptions refer to *real estate alone*. This section also constitutes the table, by which real estate is to descend and personal property to be distributed. As, by its express language, it relates to both real and personal property, it was manifestly the design of the legislature, when there were *descendants* of the intestate, to send down both to them *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, without any regard to the fact as to *how the property has been acquired.*"

We wish to impress upon the court the importance of preserving this distinction—that is, the fact as to how the property had been acquired is not material as long as there are *descendants* to take the estate; otherwise when we turn to the *ascending* line.

The court in this decision further said in this same connection:

> "And as to personal property, where there are no descendants of the intestate to distribute it to, *collaterals* will take in the same way as *descendants*, if there had been any; that is to say, without any inquiry as to how it was acquired, and, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree. This was manifestly the design of the legislature. The sec-

tions of the statute which have reference to both real and personal property, and expressly name or allude to both, or embrace them in their spirit, are the first, fourth, fifth, fifteenth, sixteenth, seventeenth and eighteenth. The fifteenth, sixteenth, seventeenth and eighteenth touch the subject of advancement. And, to attain the object in view, it was necessary to blend real and personal property together; because the amount received is the inquiry; and, whether in land or personal property, produces the same result."

The court further said:

"The effect of the first section is, to constitute the persons, who take the personal property, whether *per capita*, or *per stirpes*, and whether of the *whole* or *half*-blood, the absolute owners. Nor is it *material*, whether those persons are the paternal or maternal, or the lineal or collateral line. By that section, as already remarked, real and personal estate goes in the same channel, and *if no subsequent provisions had been* introduced touching *real estate*, the precise bearing of which, it is probable the revisers did not perceive, our labors would have been comparatively easy. At present, nothing further need be said as to personal property, as we shall find it necessary to allude to that hereafter, and shall now speak in reference to real estate."

The court then goes ahead to explain and carve out the exceptions and qualifications in the following language:

"The effect of the first section, subject to

the *exceptions* and *qualifications* alluded to, is to vest an absolute estate of inheritance in lands in the person who takes. And every estate, interest and right, legal and equitable, in lands and tenements and hereditaments, excepting only leases for years, and estates for the life of another person, are thus inheritable and descendible; or, as the first section expresses it, 'having title to any real estate of inheritance,' constitutes an inheritable estate, thus abolishing the common law doctrine, derived from feudal times, of actual seizin in the ancestor."

Further:

"We pass now to the more particular consideration of the tenth section. The manifest intention of the first part of this section, was to preserve ancestral estates in the line of the blood from whence they came. It was a partial adoption or recognition of the common law principle, which invariably followed the line of the blood. If the estate comes to the intestate by the father, or as it may be differently, and as well expressed, on the part of the father, then it must ascend to the father and his heirs, and thus overturning the inflexible rule of the common law, that an estate could never ascend; but should rather escheat to the lord. And so, if it comes by or on the part of the mother, it goes to the mother and her heirs in exclusion of the heirs of the father. In other words, it remains in the paternal or maternal lines, from whence it was derived."

The court then says:

"The tenth and twenty-second sections must be construed together, although the exact expres-

sions used in the latter, are not contained in any part of the statute. But words of equivalent signification are employed, and they are embraced within the spirit of the twenty-second section. The expression, then '*come by the father or mother,' is not limited to an estate acquired by descent merely,* but includes an estate which comes to the intestate by gift, devise or descent from the parent referred to, or from any relation of the blood of such parent. Such is the letter and spirit of the statute. In other words, there are two classes of cases provided for: One where the blood of the person, from whom the descent came, whether it be by descent, devise or gift, is *regarded;* and the other, where the blood of the intestate forms the *stirps,* or stock of descent, without respect to ancestral blood.

Chancellor Kent says there is a difference in the laws of the several states, between the succession to estates, which the intestate had acquired in the course of descent or by purchase. 'If the inheritance,' says he, 'was ancestral, and came to the intestate by gift, devise or descent, it passes to the kindred, who are of the blood of the ancestor from whom it came, whether in the paternal or maternal line'."

Insofar as the personal property is concerned, whether it was a new acquisition or ancestral, is entirely immaterial. In further discussing the question of what estate the father would take, the court in this celebrated case said:

"The portion of section 10, as to *new acquisitions,* gives the father and mother a life estate only, with the remainder to the collateral heirs of the intestate; such as brothers and sis-

ters and their descendants, and so on. A new acquisition, or newly acquired estate, does not afford, of itself, an exact idea of the mode of acquisition. By the common law, there were two modes of acquiring an estate—distinguished by the general appellations of descent and purchase. In the first, it was by operation of law; in the second, by act or agreement of parties. Devises and gifts fall in the latter class. An estate by purchase there became inheritable to the heirs general of the purchaser, first of the paternal, and then of the maternal line.

"It must be understood, however, that a new acquisition, in the sense intended by the statute, is one which the intestate has acquired by his exertions and industry, or by will or *deed from a stranger. In other words, it is an estate derived from any source other than descent, devise or gift, from father or mother or any relative in the paternal or maternal line.*

"If the son should purchase land from the father or mother, for a valuable consideration, it would be a new acquisition, and descend as such; because nothing is received by way of *bounty* at the hands of ancestors, which is the case as to lands descended from, or devised, and it was thought reasonable that they should remain in the blood from which they came.

"Land is to be considered as having come from, or by, or on the part of, the father or mother, when it comes by gift, devise or descent, either mediately or immediately from them or from any person in their respective lines."

After having fully reviewed the statutes, the court says:

"Our statute provides for ancestral and newly acquired inheritances."

It then epitomizes the statute in the following paragraphs, numbering each:

"*First.* That, as to both real and personal property it was the design of the legislature, when there were *descendants* of the intestate, to send down both to them, *per capita*, if in equal degree, and *per stirpes*, if in an unequal degree, without regard to the fact as to how the estate was acquired.

"*Second.* That, as to *personal property*, it was the design, where there were no descendants, that it should go to collaterals in the same way it would have gone to descendants, if there had been any; that is to say, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree and without inquiry as to how the property was acquired by the intestate.

"*Third.* That as to real estate, it was the design of the legislature, where there were *no descendants*, to point out the lines of the succession, *and that this is to depend on the fact, whether the inheritance is ancestral or new;* and, if ancestral, then whether it come from the paternal or maternal line.

"*Fourth.* If the inheritance was ancestral, and come from the father's side, then it will go to the line on the part of the father, from whence it came, not in postponement, but in exclusion, of the mother's line; and so on the other hand, if it come from the mother's side, then to the line on the part of the mother, from whence it came, to the exclusion of the father's line.

"*Fifth.* If the inheritance be not ancestral, but a new acquisition, then, after a life estate, reserved in succession to the father and mother, if alive, it will go in remainder, first to the line of the intestate's paternal uncles and aunts, and their descendants, in postponement of the mother's line, until the former becomes extinct; and then to the line of the intestate's maternal uncles and aunts, and their descendants; unless there should be kindred, lineal or collateral, who, either in right of propinquity, or by right of representation, stand in a nearer relation to the intestate than the uncles and aunts; in which case, such nearer kindred would take the inheritance to the exclusion of both of these collateral lines; and, in their hands, it would become an ancestral estate, and always go in the blood of the relative from whence it came, in the ordinary course of descent prescribed for ancestral inheritances.

"*Sixth.* That, when the inheritance is fixed, by these facts, *in any given line, it will pursue that line until it becomes extinct,* and the objects of bounty, and the order in which they succeed one another, and the proportion they take, are to be ascertained by the first section, which is to be considered as the general table of descent. The father, mother, brothers, sisters, and so on, mentioned in that section, are those who are to be considered when counting from any propositus, whether the propositus of a single line only, or the concurrent propositus of both lines, as the intestate, is *as to personal property.*

"*Seventh.* In all cases where the inheritance is in any one line, if there goes in succes-

sion, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, precisely as if the other line was extinct, and precisely as the inheritance of a bastard would take a course in his mother's line, he having no father's line at all.

"*Eighth.* The half-blood and their descendants take personalty, as well as realty, equally with the whole-blood, except that they are excluded from real estate when ancestral, if they lack the blood of the transmitting ancestor."

We call especial attention to the third paragraph wherein the court clearly and expressly says:

"That as to real estate, it was the design of the legislature, where there were no *descendants*, to point out the lines of succession, and that this is to *depend* on the fact, whether the inheritance is *ancestral* or *new;* and, if ancestral, then whether it come from the paternal or maternal line."

In *Shulthis* v. *McDougal*, 170 Fed. 529, the United States Circuit Court of Appeals for the Eighth Circuit carefully considered this question, and held that while the Arkansas Statute made provision for the descent of property for the civilized white community whose estates it was intended to govern, yet, as applied to the Indians of the Five Tribes it was somewhat inappropriate in its application. The court said:

"It needs but a moment's thought to see that, when this statute was applied to the lands of the Creek Nation, it was applied to a subject

matter entirely different from that which was in the mind of the Legislature of Arkansas. The lands of that tribe fit into neither of the classes mentioned in the statute (reference being to ancestral estates and new acquisitions.) They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase. In applying the statute in this case, therefore, we shall have to proceed by analogy only. The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property. It was granted to the tribe by the federal government not only as the home of the tribe, but as a home for each of the members. From the time they took up their residence west of the Mississippi, the Constitutions of the Five Nations provided that their land should remain 'common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them.' The term 'improvements,' as here used, meant not only betterments, but occupancy. *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 210, 15 Sup. Ct. 55, 39 L. ed. 120. These 'improvements' passed from father to son, and were the subject of sale, with the single restriction that they should not be sold to the United States, individual states, or to individual citizens thereof. Under such

regulations the members of the Creek Nation had been in possession of homes on their tribal lands for more than half a century. The portion of their lands which were not occupied in severalty, as well as the tribal funds, were treated as belonging to the members, and all income derived therefrom was distributed among them per capita. While the legal title to the tribal property belonged to the tribe as a political society, the beneficial use of the same had at all times belonged to the members in severalty. It was to such a condition of life and property as this that the plan of allotment here involved was to be applied. Its controlling principle is a clear recognition that each member of the tribe, by virtue of his membership, was entitled to an equal share in all the tribal property. To carry out the scheme, the law first proceeds on the one hand to ascertain the membership of the tribe, and on the other the actual present value of its property, and then directs that the tribal property be divided per capita so that each member shall receive an equal share thereof, according to its true value. The right to such a share is not created by the statutes, but is simply recognized and enforced by them. The several agreements and Acts of Congress are not concerned with the legal title, but go back to the actual beneficial rights of property as they had always existed in Indian Territory. They require allotments to be made so as to save to each member his improvements, including his right of occupancy. *While the tribe in carrying out the project grants the legal title to the property, it does not confer the right to that property.* The act by which the distribution is made is spoken of *not as a grant, but as an allotment.*

We are not departing from the well-established doctrine of the Supreme Court that the lands of these Indians belong to them as a political society and not to the individual members. *Cherokee Trust Funds,* 117 U. S. 288, 308, 6 Sup. Ct. 718, 29 L. ed. 880; *Delaware Indians* v. *Cherokee Indians,* 193 U. S. 127, 24 Sup. Ct. 342, 48 L. ed. 646. So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private, separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property *was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner.* Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. *The right of the property antedates the allotment,* and is simply given effect to by that act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. *It was his birthright. It came to him by the blood of his tribal parent, and not by purchase.* In applying the Arkansas statute, we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands not as a new acquisition by him, but as an inheritance from his parents as members of the tribe. His father was the only parent through whom he derived his right, and to the father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the par-

ents equally. From this premise it necessarily follows that George Franklin Berryhill succeeded to the entire estate of the property in question."

The above reasoning of the Court of Appeals is sound, and based on well settled principles of Indian laws. Not being able to add anything new to the reasoning of the Court of Appeals we confine ourselves to supporting the reasoning of the court.

Under the fourteenth article of the treaty of March 24, 1832 (7 Stat. 366), the third article of the treaty of February 14, 1833 (7 Stat. 417), by the letters patent issued to the Creek Nation on the 11th day of August, 1852, and the third article of the treaty of August 7, 1856 (11 Stat. 699), the lands of the Creek Nation situated in Indian Territory were held by them as a tribe in fee simple so long as they should exist as a nation and continue to occupy the lands.

The Court of Appeals in the *Shulthis* case recognized the doctrine announced in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Delaware Indians* v. *United States*, 193 U. S. 129; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Ligon* v. *Johnson*, 164 Fed. 670; and *Fleming* v. *McCurtain*, 215 U. S. 56; all of said decisions holding that the title was in the tribe as a political entity and not in the individual members or citizens of the tribe. While that is true, the *right of occupancy was in the individual citizens and enjoyed by them in severalty.* The tribe as a polit-

ical entity possessed the title, or rather possessed a base fee, as stated by opposing counsel. Nevertheless, the use and occupancy of the tribal domain was held and enjoyed in severalty, and that part of the tribal domain occupied by a citizen constituting his home, was descendible to his heirs, and when thus segregated from common occupancy, constituted a right as sacred as the fee simple absolute title of the whites.

The Creek Nation had a written Constitution providing for a republican form of government to be conducted under the three co-ordinate branches, to-wit: the legislative, executive and judicial.

The National Council of the Creek Nation, by an act duly approved October 11th, 1893 (Acts and Resolution of the National Council of the Muskogee Nation, 1900, page 5), under the head (Fence—Lawful Farm) prescribed that a lawful rail fence shall be seven rails high, well staked and double ridered; a straight fence so and so; a lawful wire fence shall be eight wires, etc.; and section 14 provides that:

> "When any citizen shall have a lawful fence as defined in this act, and the stock or property of another citizen shall damage or injure his crops, he shall be entitled to damages for such injury, which shall be assessed by two disinterested persons, said persons to be appointed by the judge of the district wherein said damage is done."

And section 15 provided that:

> "No citizen not having a lawful fence shall

be entitled to damages done to his crops by the stock of another."

In the Constitution and Laws of the Creek Nation of 1893 (McKellop), duly printed and published, certain exemptions from levy and sale under execution are provided for, and section 254 makes it unlawful "to levy upon and sell, under any execution or decree of any court, any improvement upon the public lands to satisfy any debt by contract."

In the Constitution and Laws of the Muskogee Nation, 1893, by McKellop, page 57, will be found the following section, under the caption, "Vacated Places," to-wit:

> "Section 147. *Places which have been vacated, without fencing or houses, for the term of five years, shall be liable to settlement and improvement by any person, and any one who may settle upon such places shall have all the rights to them as if they had never been occupied before.*"

Likewise, on page 94 of the Constitution and Laws of the Muskogee Nation, 1893, by McKellop, under the head of "Wills and Administration," we find the following section, to-wit:

> "The *homestead* and kitchen furniture, one work horse, one cow and calf, and one breeding sow, shall be exempt from seizure or force sale for any debt against the estate."

The section just preceding the above quoted section, provides that:

"The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate if there are no children, and a child's part, if there should be children, in all cases where there is no will. The husband surviving shall inherit of the deceased wife in like manner."

Section 333, on page 115 of the same Laws and Constitution of the Muskogee Nation, provided that any citizen,

"head of a family, engaged in the keeping or grazing of livestock in this nation, shall for that purpose be entitled to enclose for his exclusive use, free from any manner of tax, one mile square of the lands of the public domain; but such enclosure shall not intrude on the rights of any other citizen without his or her consent."

These sections of the Creek published laws preserve to the heirs of the deceased occupant the homestead, and make it free from seizure or force sale for any debt against the estate.

The Eighth Circuit Court of Appeals in *Davison* v. *Gibson,* 56 Fed. 443, had before it a case involving the descent of a forty-acre farm improved and in the possession of a Creek freedwoman. It does not appear from the statement of that case, and the opinion of the court, that anybody contended that the forty-acre farm although not allotted reverted to the tribe upon the death of the occupant.

Indian title by occupancy before allotment was sufficient title on which to base ejectment.

—*Hockett* v. *Alston*, 58 S. W. Rep. 675;
James v. *Smith*, 58 S. W. Rep. 715;
Hockett v. *Alston*, 110 Fed. 910;
Wilson v. *Owens*, 86 Fed. 572.

That the right of occupancy descended, see *Rush* v. *Thompson*, 53 S. W. 333, and *Nivens* v. *Nivens*, 64 S. W. 604, all Indian Territory cases.

The nation had a duly authorized Supreme Court provided for by its constitution. The records of that court are in the custody of the federal government, and in the archives of the Interior Department.

That court had before it, in 1880, '81 and '85 (justice proceeded slowly in the Creek Nation as well as other courts), the case where one Ann Rogers, a Creek citizen, was the owner of a certain farm at the date of her death; she left a non-citizen husband, and the case involved the question as to whether or not the brothers and sisters of the deceased, Ann Rogers, were entitled to the property, or the non-citizen husband. Quite an elaborate written opinion was filed by the Supreme Court of the Creek Nation in that case, and among other things the court said:

> "It is also shown that John T. Rogers, in his answer to the allegations by the petitioners before said John Q. Tufts, United States Indian Agent, stated that the place on which Mrs. Rogers lived was the property of herself, and no

one else. This he failed to substantiate by evidence, for the property was made the property of William Fisher. From this it is evident that the said Rogers was in this matter actuated by unseen and unlawful motives."

In the appendix to this brief, the court will find decisions of the Supreme Court of the Creek Nation clearly showing that Creek citizens had the right to inclose a part of the public domain, improve the same, and on their death, the right to the possession of the inclosure and the improvements thereon, passed to the heirs.

Strictly speaking, an allottee was not a grantee or purchaser or donee. The word "allot" itself signifies a partition among those holding an interest in common. Thus, in *Minnesota* v. *Hitchcock,* 185 U. S. 396, this court said:

> "As said in *Worcester* v. *Georgia,* 6 Pet. 515, 582, 8 L. ed. 483, 508:
>
> > 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. *To contend that the word "allotted," in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged,* would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this

> unlettered people, rather than their critical meaning, should form the rule of construction'."

Says Chief Justice MARSHALL, in *Johnson* v. *McIntosh*, 8 Wheat. 543, 603, 5 L. ed. 681:

> "It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right."

So, in *United States* v. *Cook*, 19 Wall. 591, 593, 22 L. ed. 210, the court, speaking through Mr. Chief Justice WAITE, says:

> "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy."

Yet later, in *Beecher* v. *Wetherby*, 95 U. S. 517, 525, 24 L. ed. 440, the court says:

> "But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians. That occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."

An allotment is not a donation, and the title of the allottee is not a new acquisition. His right antedates the allotment, and herein lies the difference between the status of the tribal domain and the public lands of the United States. As pointed out the tribal domain was occupied by the citizens in severalty, whereas, the public lands of the United States are not occupied by the citizens, but on the other hand the occupancy of the public lands of the United States is made a crime by Federal Statute (23 St. L. 321, 6th Fed. St. Ann. p. 533), unless the claim is made "in good faith with a view to entry thereof at the public land office under the general laws of the United States at the time any such enclosure was or shall be made." The Creeks had no land office as a tribal institution. The citizens of the Five Tribes occupied the land in severalty, and the Arkansas cases holding that a title acquired to public lands of the state or United States is a new acquisition are not in point. The doctrine of the Eighth Circuit Court of Appeals in the *Shulthis* case, *supra,* is fully supported by the decision of the United States Circuit Court of Appeals for the Ninth Circuit, in *Beam* v. *United States,* 162 Fed. 260. In the *Beam* case the court had under consideration the general allotment act of '87 and the effect of that act, and in speaking of the title of the individual allottee the Court of Appeals said:

> ***"The Indians were not donees of the government, and the allotment was not made as a***

mere act of its bounty. It was an act of partition in severalty to individual Indians of lands the title to which the United States then and for many years had held in trust for the tribe."

And, again, in *Spalding* v. *Chandler*, 160 U. S. 394, 402, 16 Sup. Ct. 360, 364, 40 L. ed. 469:

> "It has been settled by repeated adjudications of this court that the fee of the lands in this contry in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land, with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to-wit, the right to possess and occupy the lands for the uses and purposes designated."

In *Parr* v. *United States*, 153 Fed. 462, the court had under consideration a similar question, and said:

> "Now, while it is true that the government can dispose of the fee, in absolute derogation of the possessory rights of the Indians, yet unless the government assumes, itself, to extinguish the Indian title, its grantee takes subject and subordinate to their possessory right. Upon the other hand, the Indian title cannot be conveyed by the Indians to any one but the United States without the consent of the latter. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. ed. 299; *United States* v. *Alaska Pack-*

ers' Association, (C. C.) 79 Fed. 152. So that, in consideration of the long-settled policy of the general government, the Indians possess such a right of occupancy in and to the lands set apart to them by treaty out of their larger dominions as no one except the government itself can disturb; and the government has always, unless in exceptional cases, *respected that right, and treated it as one of property.*

"The government having the fee of the lands upon the Umatilla reservation, and the Indians the right of exclusive occupancy and possession, the Congress has provided for allotments of such lands in severalty, but not until the consent of the Indians thereto shall have been given; nor by the act has Congress departed essentially from the stipulations of the treaty in that behalf. Looking back to the treaty, therefore, the intendment with both the government and the Indians was that the latter at some time, when developments had demonstrated their capacity to manage successfully their property affairs, should come into the ultimate title to those lands, or a portion thereof, in severalty, and be able to hold and enjoy them as citizens of the United States and of the states hold and enjoy real property; there being a joint ownership by occupancy on the part of the Indians. The fee being in the government, the allotments were had with a view to clothing the Indians with the fee in particular tracts in severalty. *There was no donation or grant in the sense of disposing of the public domain to settlers thereon, but a fulfillment of treaty stipulations;* the consideration for the allotments having long since been fully performed on the part of the Indians, and they having yet only to dem-

onstrate their capacity to manage the property to entitle them to the fee absolute. To 'allot' is:

> 'To divide or distribute, as by lot. To distribute or parcel out in parts or portions; or to distribute to each individual concerned; hence, to grant, as a portion; to give, assign, or appoint in general.' Webster's Unabridged Dictionary.

"So the purpose and process here was to distribute to each person concerned, in full accord with treaty regulations, that which was understood and conceded *to rightfully belong to the Indians themselves,* although the fee was held for them by the United States in the capacity of guardian of their property and estate; *the allotment being intended as in the nature of a partition among joint owners of realty,* whereby there should be set apart to each owner a single portion in severalty as and for his joint interest or property in the whole. The United States in making the allotments was dealing with the fee, and yet conceding that the Indians were entitled to it, and providing that in due time they should have it. *'Allot' is not a term of sale or grant, but of apportionment of that to which the parties are entitled as of right.* The Honorable WILLIAM H. TAFT, Solicitor General, advising as to the allotment of lands to individual Indians, asked: 'What is the Indian right of occupancy?' To which he answered:

> 'It is the right to enjoy the land forever, with the right of alienation limited to one alienee, the United States, or to such persons as the United States, in its capacity of guardian over the Indians, may permit.'

"And then, after stating the government's relation to the Indians as guardian he makes this further observation:

> 'Allotments in severalty of Indian land are therefore naturally evolved from the Indian right of occupancy.' 20 Opinions Attorney General, 42, 48."

This doctrine was clearly recognized by this court in the recent case of *Choate* v. *Trapp*, 224 U. S. 671, wherein Mr. Justice LAMAR said:

> "The individual Indian had no title or enforceable right in the tribal property. But as one of those entitled to occupy the land *he did have an equitable interest*, which Congress recognized and which it desired to have satisfied and extinguished. The Curtis Act was framed with a view of having every such claim satisfactorily settled. And though it provided for a division of the land in severalty, it offered a patent of non-taxable land only to those who would relinquish their claim in the other property of the tribe formerly held for their common use. For, the Atoka Agreement, after declaring that 'all land allotted should be non-taxable,' stipulated further that each enrolled member of the tribes should receive a patent framed in conformity with the agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this agreement and *to relinquish all of his right in the property formerly held in common.*"

In *Martin* v. *United States*, 168 Fed. 205, the Eighth Circuit Court of Appeals, speaking through

Circuit Judge SANBORN, in referring to the rolls of citizenship of the Creek Nation, says:

> "It was a link in the chain of title of each allottee to his allotment."

The following Acts of Congress provided for the enrollment of citizens, to-wit:

1. Act approved June 10th, 1896 (29 Stat. L. 339).
2. Act approved June 7th, 1897 (30 Stat. L. 83), which act declares that the words "rolls of citizenship" used in the Act of June 10th, 1896, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation *"and the descendants of those appearing on such rolls,"* etc.
3. Original Curtis Bill approved June 28th, 1898, section 21 thereof (30 Stat. L. 495).
4. Act approved March 3rd, 1901 (31 Stat. L. 1077).
5. The 28th section of the Original Creek Agreement (31 Stat. L. 861) and sections 7 and 8 of the Supplemental Creek Agreement (32 Stat. L. 500). Section 28 of the Original Creek Agreement provided for closing the rolls, and but for that provision children born after the act would have been entitled to an allotment the same as those citizens living at the date of the various allotment acts.

—*Fairbanks* v. *United States,* 223 U. S. 215, 171 Fed. 337.

Rule of Property.

If the decision of the Court of Appeals in the *Shulthis* case, 170 Fed. 529, and the decision of the Oklahoma Supreme Court in *Pigeon* v. *Buck,* 38 Okla. 101, be wrong, they ought to be reversed, but the opinion of the Court of Appeals came down on June 3rd, 1909, about six years ago, and having been followed by the state Supreme Court, it appears to have grown, or almost grown, into a rule of property. But aside from that it would be unfortunate to sustain the contention of the plaintiff in error because it would scatter the titles to inherited lands to the four winds, and the fragments inherited by the various collateral relatives would be of little value to each, and of no market value to any, whereas, the rule announced by the Court of Appeals and the Oklahoma Supreme Court is the equitable application of the statute because it gives the land to those really entitled to it, that is, the father and the mother, and the Oklahoma Supreme Court, on January 18th, 1915, in an opinion not yet published, in *Thorn* v. *Cone,* No. 3832, applied the rule in the *Shulthis* case where the allottee died leaving a father and no mother, and held that the estate being ancestral on both the side of the father and the mother, both parents having been enrolled as citizens, one-half was inherited by the father and the other half by the mother's heirs, the court following the statement of the Court of Appeals in the *Shulthis* case that "if

the mother had been a member of the tribe then the land should properly pass to the parents equally."

The syllabus in the *Thorn* v. *Cone* case is as follows:

> "*1.* Sissy Jefferson died on or about the 13th day of February, 1903, and Lena Jefferson died on or about the 20th day of July, 1904, both having received their allotments before their deaths. *Held,* chapter 49 of the Laws of Arkansas (Mansfield's Digest), entitled 'Descent and Distribution,' controls descent of such allotments.
>
> "*2.* Mansfield's Digest, chapter 49, section 2531, provides that where the intestate shall die without descendants, if the estate comes by the father, then it shall ascend to the father and his heirs; if by the mother, the estate or so much thereof as came by the mother shall ascend to the mother and her heirs. *Held,* that under the facts in this case, the estate came to the allottees by the blood of their tribal parents by reason of the facts that they were Seminole citizens, and upon their death, the father and mother take the estates in equal parts.
>
> "*3.* Where the mother dies before descent is cast, the interest which she would have inherited if living, will go to the line of those who are of her blood to the exclusion of the father and his heirs."

Reply to Brief of John B. Meserve, *Amicus Curiae.*

The *amicus curiae* brief contends that where the allotment is made direct to the heirs, the heirs take by purchase and therefore take as a class, and

that resort should be made to the first section of chapter forty-nine of Mansfield's Digest, section 2522, for a list of the heirs, and the balance of the Arkansas law of descent ignored. In other words, where the allotment is made direct to the heirs, only one section of the Arkansas law of descent is applicable, that being the first, and that all the balance of the statute is to be ignored. If the contention of the *amicus curiae* is correct, then where the allotment is made to the heirs of a deceased citizen who left one child and two grand-children, the allotment would pass to the three in equal undivided parts—the child getting a third and each of the grand-children a third, whereas, we contend that by applying the whole of chapter forty-nine the child would receive one-half and the two grand-children the other half in equal parts. Of course if this court should adopt the theory of the *amicus curiae,* we win our case, and the judgment of the Oklahoma Supreme Court will be affirmed, but we would regard such a decision as extremely unfortunate. It would introduce a new and novel element into the already complicated land title affairs in the Five Tribes. Heretofore there have been two theories: one that the allotment was a new acquisition, and the other that it is ancestral, and around those theories the controversy has raged. Now we have a new Richmond in the field. It is wholly inconceivable to any one familiar with the Indians to believe for a moment that they ever understood or intended any distinc-

tion or difference between the *status* of heirs taking by purchase technically, and heirs taking by descent technically. As argued under the first point in this brief, it is clear that the Indians knew nothing about the technicalities of the law of descent, and the Arkansas statute should certainly be applied in a case where the heirs take by purchase just the same as where they take by descent technically.

This court, in *Worcester* v. *Georgia,* 6 Peters, 515, said, with respect to construing Indian treaties: "How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction," and likewise, again, said in *Jones* v. *Meehan,* 175 U. S. 1, that "Indian treaties must be construed not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians."

While it is true that both the Original and Supplemental Creek Agreements obtained their efficacy from the acts of Congress approving them, nevertheless, they were the result of negotiations between the Dawes Commission and the representatives of the tribe, and should be interpreted according to the rule of construction above set forth, and this court in the recent case of *Choate* v. *Trapp,* 224 U. S. 675, applied the above rule to the Supplemental Agreement with the Choctaws and Chickasaws.

In the light of the above rule of construction is it not utterly absurd to say that the Indians under-

stood the difference in the legal status of heirs taking by purchase and heirs taking by descent? They certainly never contemplated a different application of the law of descent in the two cases.

If the contention of the *amicus curiae* be sustained, then the court is in the attitude of holding that the Indians, while intending to apply the whole of chapter forty-nine of Mansfield's Digest to a case of actual descent, yet intended to apply only the first section when the citizen happened to die before he received his allotment, and the land was afterwards allotted in his name to the heirs. Such a construction would attribute to the Indians a remarkably well developed understanding of refined technicalities. Then the court can also see where such a construction would lead to. It would introduce all kinds of confusion. But chapter forty-nine of Mansfield's Digest was made applicable as an *entirety*, and under the rule announced by the Arkansas Supreme Court in *Kelly* v. *McGuire*, 15 Ark. 582, fully discussed in this brief from pages 39 to 47, it becomes material and necessary to determine whether the estate is ancestral or new *whenever we turn to the ascending line.* When there is a default of descendants, it becomes absolutely necessary to first determine whether the estate is ancestral or new, in order to find the path of inheritance in the ascending line. Besides, the Arkansas Supreme Court, in numerous decisions, *Kelly's Heirs* being one, has held that the first section of chapter forty-nine of

Mansfield's Digest must be construed in connection with the tenth section thereof, and it therefore appears impossible to carve out section one of chapter forty-nine and apply it to certain cases, and then apply the whole chapter to other cases.

We trust the court will have little difficulty in disposing of the contentions of the *amicus curiae.*

We understand it is suggested in the brief of counsel in the *Pigeon-Buck case,* a companion case, that the allotment of adopted citizens could not be classed as ancestral. That is a small matter, for we understand that there were only five adopted citizens in the Creek Nation. And suppose the allotment of an adopted citizen is a new acquisition, that is no reason for holding that the allotment of a freedman or citizen by blood is a new acquisition.

The freedmen were incorporated into the tribe by the treaty of 1866, and soon thereafter Mr. J. W. Dunn, acting under authority of the United States, made a roll of the freedmen citizens of the tribe. That roll was confirmed by the Original Curtis Act approved June 28th, 1898 (30 Stat. L. 495), section 21 thereof, which provides that

> "The roll of Creek freedmen made by J. W. Dunn, under authority of the United States, prior to March fourteenth, eighteen hundred and sixty-seven, is hereby confirmed, and said Commission is directed to enroll all persons now living whose names are found on said rolls, *and all descendants born since the date of said*

roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation."

Likewise, the Cherokee freedmen, and the Seminole freedmen were also incorporated in those respective tribes, as were also the Choctaw-Chickasaw freedmen, and their allotments are ancestral in every sense of the word.

We, therefore, respectfully submit that the case should be affirmed.

GEO. S. RAMSEY,
EDGAR A. DE MEULES,
Counsel for Defendants in Error.

APPENDIX.

Opinions of Supreme Court of the Creek Nation as of Record in Permanent Journals Kept by the Court: Now in the Custody of the Department of the Interior of the United States.

SUPREME COURT ROOM.

Dec. 5th, 1895.

Court convened as a new Court to organize it being the beginning of the Constitutional term. The newly elected Judges all present-

Judge John Reed was elected Chief Justice, *protem*- After taking his seat-he called the Court to order- and opened with prayer- The Judges John Goat- Thos Adams- Kellop Murrell were sworn in by Chief Justice. After which Judge Thomas Adams- Acting Chief Justice Pro tem administered the oath to John Reed, who was elected Chief Justice pro tem, to install Isparhecher- as Chief Executive of the Muscogee Nation- He installed the members of the house of Kings- Court adjourned to 1 o'clock - Court convened at 1 P. M. House of Kings notified the Court that the 1st & 2nd Chief was to receive the Oath of Office. The Court in a body (the Clerk bearing the Bible) repaired to the House of Kings- Where according to the law- the 1st and 2nd Chief were duly sworn in as Principal and Assistant Chief of the Muscogee Nation- After listening to the inaugeral address, and in a body attending the reception of the Chief- they assembled in the Supreme Court room and organized permanently for business.

Judge T. J. Adams was elected Chief Justice for the Constitutional term, and took his seat. Mrs. Sue M. Rogers was elected Clerk and Jack Roberson, Caller for the Supreme Court for the Constitutional term and sworn in- Court being regularly organized- proceeded to business.

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the minute of the proceeding of Supreme Court of the Creek Nation on page 264 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

SUPREME COURT, MUSCOGEE NATION,

October 10, 1890.

CATHERINE BELLSTIDT

vs.

TOBE FRANKLIN &

TACKEY GRAYSON.

This suit was brought by Plff to set aside a sale of two houses and lots in the town of Muscogee, purchased by Defendants at that sale, which sale was made by virtue of an order from the District Judge of Coweta Dist. for the collection of a bond executed by Geo. Bellstidt, the son of Plff. upon which bond Plff. was one of the Assurities, A forfeiture was taken on said bond, and Geo. Bellstidt was re-arrested tried and acquitted.

The evidence in this case shows that this property belonged to Plff., that she lived in one of the houses, and that she notified the office making the

sale, in writing, with an itemized memorandum of her property, amounting to less than five hundred dollars, and that this notice was given before the sale was made. It is also in evidence that the sale was made on the 30th day of Aug.- 1890, and that this property brought only one hundred and eighteen dollars. The evedence further shows Mrs. Bellstidt, the Plaintiff in suit, to be a citizen of this Nation, and the head of a family.

Section 2 of an act approved June 21st, 1889, says "The personal property of any citizen of this Nation who is married or the head of a family, in specific articles to be selected by such citizen, not exceeding in value the sum of five hundred dollars, in addition to his or her wearing apparel, and that of his or her family; and also all house-hold or kitchen furniture, and all agricultural and horticultural general farming implements, shall be exempt from seizure on attachment, or sale on execution, or other process from any court on debt by contract. The Court construes this section as well as the other section of this act, to be a general Exemption law, with no exceptions only such as is mentioned in the first section, which says "that no property shall be exempt for debts contracted for the purchase money therefor, while in the hands of the vendee."

It is very evedent to this court that our National Council intended by this law to shield the property of our citizens from every process of forceable seizure, when the same did not exceed the amount stipulated, which intent we cordially command, as an act of wise and patriotic legislation. Debts of all kinds, are simply the result of contracts mutually entered into between two or more parties.

A bond is as much the result of a contract as a debt- both are obligatory, and cannot be legally enforced against the obligor without a process from a court.

It is therefore the opinion of the Court that the property of a bondsman is exempt from seizure and sale, as much so as that for any character of debt. The Second Section of an act approved October 21st, 1881 page 128 of our new Digest, simply requires Dist. Judges to accept bonds of those arreigned on Criminal charges, when the assurities on such bonds shall swear that they are possessed of property to the full value of such bonds over and above all their personal liabilities. Judges are not compeled under this law to accept a bond untill the solvency of bondsmen are sworn to be equal to the amount of the bond over and above all liabilities. It is very plain that the liabilities of a bondsman whether for debt or other wise constitute a legal exemption from any forceable seizure authorized against the property of bondsmen. The act of June the 30th 1889 adds to such liabilities of bondsmen a further exemption of five hundred dollars worth of personal property which exemption Judges taking bonds must take judicial notice, and accept no bondsman who is not worth the amount of his assurance over and above all exemptions and liabilities thus recognized by law. *Improvements on our public domain are also exempt from any forceable seizure and sale for any character of Debt. Therefore Improvements on the public domain are regarded by this Court as specific articles of exemption not embraced as personal property, and must not be estimated as such, in testing the solvency of a bondsman. We regard this as a wise provision, as it protects our citizens in the possession of their homes and therefore is regarded by us as a homestead law. Other governments of superior intelligence have such laws for the protection of their citizens, and it is highly appropriated and wise we should extend such protection to our citizens. Officers of our government can not be too vigilant in protecting this sacred right to the citizen.*

Judges taking or accepting bonds should take judicial notice of all these exemptions, and reject any bondsman who does not swear that he or she is worth the full amount of the bond over and above those exemptions.

Judgment is therefore rendered for the Plaintiff in this suit- decreeing back to her the lawful possession of the property in controversy, and the Judge of Muscogee District is hereby directed to protect her in the peaceable posession of the same against any interferance on the part of the Defendants herein, or their Agent.

G. W. STIDHAM,
Chief Justice,
M. N.

S. B. CALLAHAN,
Clk.

This opinion is agreed to by judges G. W. Stidham, Wm. Jones and Hardy Stidham and discented to by Judges John Reed and Isparhecher.

S. B. Callahan, Clk.

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on pages 105, 106 and 107 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

SUPREME COURT

Aug. 5th, 1896.

HON. JAMES COLBERT
Pres. Citizenship Commission

SIR: Your communication of July 22nd, 1896, asking the opinion of this Court on the following question, has been received to wit:

"We would respectfully request you to render an opinion upon the Constitutionality of an act of the National Council, approved Oct. 26th, 1889, found on page 105, compiled laws of the M- N- Edition 1893, at as early date as possible."

In answer hereto the Court is of the opinion that this act is not inconsistant with the legislative functions of our council. It is only remedial in character, and not retroactive. There cannot be any question, as to the Constitutional authority of Council to enact any law of a remedial nature.

It only closes the door of our Nation after a lapse of nearly seventy years. All persons having citizenship rights in our Nation have certainly been afforded ample time, and opportunity to ask for them. No Indian, who loves his race, would remain out of his country for twenty-one years unless debarred from exercising his freedom- and it is equally true that if he has thus remained away, he *has* selected a home of his own choice with no intention of leaving it. It is certainly in the province of the tribal Council to close its door after wating the pleasure of these absentees for fifty years. The evident purpose of this law is simply to exclude from our Nation all persons who have never placed their foot on our soil, even though they should be full blood Creeks and the Court so construes the meaning.

Very Respectfully,

SUE M. ROGERS, *Clerk.*

T. J. ADAMS, *Chief Justice.*

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision

of the Supreme Court of the Muskogee as same appears on page 286 and 287 of the Minute Book for said Court, as on file in this office.

DEC 22 1913 J. G. WRIGHT,
C H D Commissioner to the Five Civilized Tribes.

SUPREME COURT

Case No. 143.

June 16th, 1896.

BILL MCINTOSH
JULIA GREEN
vs.
BILL WILLIAM

This is a suit for the recovery of a part of the estate of Danial Williams, as heirs thereof- consisting of one farm and homestead- thirty head of hogs and other property, scheduled as per appraisement- and also the property of Julia Green's mother, consisting of thirteen head of stock cattle, valued at five hundred dollars.

This case appears from the Docket to have been instituted Oct. 1st, 1894, and on June 8th, 1895, judgment rendered by Default for Plffs- Application was made by Deft. for a re-opening of of the case, and on June 13th,- application was granted and the case set for re-hearing Oct term 1895- continued to Nov 1895- and continued to June 1896- June term 1896- case called day after day- Plffs reporting ready- Deft not present- Evidence was submitted to the Court by Plffs- After due consideration of the facts in the case- judgment therefore is rendered for Plffs in suit - decreeing to them the lawful possession of the property in controversy- And the Judge of Muskogee Dist- is hereby ordered to place the Plffs in possession and protect them in peaceable possession of the same.

THOS. J. ADAMS,
Chief Justice,

SUE M. ROGERS
Clerk.

M. N.

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on Page 276 in the Minute Book of said Court, as on file in this office.

DEC 22 1913 J. G. WRIGHT,
C H D Commissioner to the Five Civilized Tribes.

SUPREME COURT

Case 161

June 18th, 1896.

Mrs. E. E. Weldon
vs.
Mrs. Patty Overton.

This case is for the recovery of fifty acres of land near Wagoner, I. T.- valued at Five ($500.00) Hundred Dollars and damages, Three ($300.00) hundred dollars.

A careful and thorough investigation of the evidence brought to bear in the case, shows that the peice of land in controversy, was public domain, and that the Deft Mrs. Patty Overton was the first to make improvements thereon-

It is therefore the opinion of the court, that the Deft Mrs. Patty Overton has the legal right of occupancy, and judgment is hereby rendered in her favor.

Thos. J. Adams,
Chief Justice,

J. H. Lynch
Clerk.

M- N-

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the

Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 279 of the Minute Book for said Court, as on file in this office.

DEC 22 1913 J. G. WRIGHT,
C H D Commissioner to the Five Civilized Tribes.

SUPREME COURT

Nov. 30th, 1891.

M. B. JONES
vs.
ROBINSON ROBERTS &
GEORGE ROBERTS

This is suit for the recovery of a farm valued at three hundred dollars.

The testimony in this case discloses the fact that these defendents sold to Plff. a certain farm for three hundred dollars and received payments thereon at different times amounting to one hundred and thirty nine dollars and fifty cents; forty four dollars and fifty cents of which amount has been returned to Plff. and now under his control. It is also shown that no definite time was designated when final payment for said farm should be made; and that Defts. before demanding final payment therefor, nor without the knowledge or consent of Plff. sold said farm to another party, and then returmed to Plff. forty four dollars and fifty cents. It is also shown that the farm in controversy belong to Robinson Roberts one of these Defts. who is now dead, and who is the son of Geo. Roberts, the other Deft. At the time this sale was made to Plff. both these Defts. were present and both acted jointly in receiving the payments for said farm.

It is the opinion of the Court that the sale of said farm to Plff. was a valid sale and his posses-

sion and control therefore could not be disturbed by any subsequent sale made by either of these Defts. The only remedy these Defts. had against Plff. for the return of this farm to them, was only a failure of payment, for every species of property sold must stand good for the purchase money until fully paid for. It appears that Plff. still owes Deft. a balance of two hundred and five dollars on said farm.

It is therefore ordered and decreed by the Court that Plff. have and hold said farm and shall have until the first day of May 1892 to pay Deft. the balance due on said farm which balance he may pay in cash or in cattle and horses at a fair Cash valuation.

M. L. CHECOTE
Clk.

S. B. CALLAHAN,
Chief Justice.

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on pages 150 and 151 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

Okmulgee I. T.

DOCTOR WILLINGHAM

vs.

YARKENHA *(et al).*

This suit is for the recovery of an estate of John Willingham (Decease) which was appraised by Judge March Thompson of Eufaula Dist- And was divided into two equal parties, one half of which was given to one Doctor Willingham (In the eyes of

the law) the true heir- which requires the nearest blood relation.

The evidence in the case shows that at the time of the death of John Willingham- There were two heirs, a son and a daughter, but before the estate was properly appraise, and given to the two heirs, the daughter died and only the son, remain as the true heir to the estate, But the evidence in the case shows that half of the property was given to three different person's who are not heirs to the estate, on a suppose ruling of the Supreme Court- which is not on record. There is no law or ruling on record, that would take from the true heir any part of the estate- Unless it be for honest debt. Therefore the opinion, and decission of this court is that the action of the judge of Eufaula Dist. be and is hereby reverse, and the Judge be instructed to turn the property over to Doctor Willingham the true heir- by its light- horse men. Done this the 11th day of June, 1893.

J. H. LAND
Clk.

WM. F. MCINTOSH,
Chief Justice.

M-N

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 181 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

SUPREME COURT OF MUSKOGEE NATION.

Okmulgee, I. T. Nov. 3rd, 1894

LIDIA CHILDERS
vs.
NANCY DREW

This is a cause wherein Lidia Childers is the Plaintiff and Nancy Drew is the Def'd'nt. The cause of action being for the recovery of a farm and improvements, now in possession of the def'd'nt under lease to certain non-citizens.

The court herein decides, that in the absents of any showing on the part of said Nancy Drew and she (Nancy Drew) failing to answer the complaints of said Lidia Childers, that the said farm and improvements are the property of Lidia Childers and it is so declared.

In testamony whereof I hereunto fix the seal of this court and my Official signature.

O. A. MORTON, *Clk.* — W. F. McINTOSH, *Chief Justice M N*

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 241 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

SUPREME COURT

Dec. 2nd, 1891.

ELSIE COBB

vs.

R. R. BRUNER

This is a suit for the recovery of a debt of 408 dollars.

The evidence in this case shows that Plff purchased a farm from Deft. for one hundred and fifty dollars and executed a note for the same, on which note payment had been made to the amount of thirty eight dollars, when said farm was taken from Plff by law. It also appears that all the rails and other articles placed on said farm by Plff. have been removed therefrom by Plff.

It is therefore the opinion of the Court that the amount involved in this case does not reach one hundred dollars; and therefore not within the jurisdiction of this court. The case is therefore dismissed from the docket.

M. L. CHECOTE, *Clk.* SAML. B. CALLAHAN, *Chief Justice.*

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 149 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

WM. MCINTOSH
AND
JULIA GREEN
vs.
BELL WILLIAMS

This is a suit for the recovery of the following property as part of the effects of the estate of Daniel Williams as the heirs thereof, to wit; One farm and homestead, thirty head of hogs, and other property as scheduled for appraisement, and also the property of Julia Green's mother's estate consisting of thirteen head of stock cattle valued at five hundred dollars. This case appears from the docket to have been instituted October 1st 1894. The facts herein are that on June the 8th 1895 Plffs. and Deft was called for announcement, when Plffs. announced ready for trial, but Deft appeared not, whereupon Plffs submitted to the court their evidence and upon hearing hereof, the Court rendered Judgment for Plffs by default.

W. F. MCINTOSH,
Chief Justice.
M N

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 246 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

June 10th

Court met pursuant to adjournment at 9 A M

Present all the Judges. Court opened with prayer by the Chaplain. Minutes of yesterday read and approved. The case of Lydia Childers vs. Nicy Drew was taken up for trial and after the testimony was submitted and argument of Council heard the Court rendered judgment for the Plff as follows, June 12th 1895.

This is a suit for the recovery of a farm and improvements, conprising about 65 acres of land valued at $250.00 dollars.

It appears from the evidence that Plff bought an improvement consisting of a house and a field of 20 acres of land, also included in said purchase a piece of uncultivated land adjoining to said field, around which her vendor had plowed some furrows, and obtained the consent of the owner of two strings of fence bordering thereto to join fence with them, and that she paid the purchase money as alledged.

It is also shown that Deft is in possession of said uncultivated land by virtue of a seven year lease with a noncitizen and by no other right.

It is held by the Court that unimproved land adjoining to an improvement cannot be taken by other than the owner of such improvement, or by the consent of such owner. It is also held that furrows stakes or any other marks of designation showing the meets and bounds of unimproved land adjoining an improvement, is sufficient evidence to establish the intent of a citizen to use said land for individual purposes, and vests in such citizen constructive possession thereof, provided such marks of designation shall embrace a reasonable quantity of land for farming purposes only.

It is further held that possession of land in this

Nation by a noncitizen is illegal and void, unless such possession shall be by virtue of rental contract for a period not to exceed one year.

It is therefore the opinion of the court that Plff herein is entitled to the lands in controversy and the Court so decrees.

S. B. CALLAHAN, *Clerk*

W. F. MCINTOSH, *Chief Justice.*

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on pages 247 and 248 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

MUSKOGEE NATION
vs.
G. W. GRAYSON

This is a cause wherein the defendant G. W. Grayson was sued in this court at its last June term, by the Muskogee Nation represented by A. P. McKellop, and others for the recovery of $1276.75- money of which the national safe was robbed over ten years ago, when defendant was treasurer of the Nation- It is urged by counsel for the Nation that under act of Nov. 3rd, 1893 Defendant is liable and indebted to the Nation in the sum of the amount stolen- namely $1276.75 with interest to date, and this Court is prayed to render judgment to that effect. The Defendant G. W. Grayson denies that he is now, or ever was indebted to the nation in the amount claimed, and avers that there is no founda-

tion either in law or facts on which to predicate said claim against him.

The cause was fully discussed by Council and submitted to this Court.

The associate Justices divided equally on the question and it finally rested with the Chief Justice to decide. In order to give myself ample time for a fair and full consideration of the subject thus left to me, I postponed final action until the present cession.

Now the cause is one upon which much time and attention has been bestowed and further, elaboration is unecessary. Sufficient it is to say that the act of Nov. 3'93 clearly intends and propoeses to take effect upon a thing that occurred many years before its enactment; upon this point there can be no controversy and upon this point the Constitution is equally clear and leaves no room for misconstruction. Article 8 and 2 reads as follows: No laws taking effect upon things that occurred before the enactment of the laws shall be passed; In this case the occurrence took place over ten years ago while the law under which action is brought was only enacted Nov. 3rd, 1893. With these lights before me the conclusion is forced that the said act of Nov. 3rd 1893 is unconstitutional null and void. There being therefore no warrant in law for action in this case. The cause of the Muskogee Nation against G. W. Grayson must of necessity be dismissed and the Court hereby so orders.

J. H. LAND, *Clk.* W. F. MCINTOSH, *Chief Justice*, M. N.

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the

Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Muskogee Nation as same appears on pages 228 and 229 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

INDEX

PAGES.

Statement 1- 5

Argument 6-69

No Rule of Property has been established by the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal* and the Oklahoma decisions following it... 6-19

Had Andrew J. Berryhill lived to receive an allotment he would have taken the same, not technically merely, but substantially, by purchase from the United States and the Creek Nation, and not by descent from his tribal parent.....20-48

Had Andrew J. Berryhill lived to receive his allotment, he would have taken the same, as a new acquisition, by purchase from the United States and from the Creek Nation, even if it be assumed for the purpose of the argument that he took an equitable estate therein by descent from his tribal parent, because the source of the legal title is the controlling factor in determining whether an estate be a new acquisition or an ancestral estate 49-61

Andrew J. Berryhill having died prior to the enactment of the legislation authorizing the making of an allotment to his heirs, and no estate, therefore, having vested in him, said allotment was not

an acquisition, new or otherwise, in Andrew J. Berryhill; hence the allotment did not descend to his heirs either as an ancestral estate or as a new acquisition, under Section 2531 of Mansfield's Digest, but vested in his heirs, under Section 2522 of Manfield's Digest, by direct grant from the United States and the Creek Nation, becoming a new acquisition in said heirs.....62-69

TABLE OF CASES

Cited herein at page

Anglo-American Land, etc., Co. v. *Lombard*, 132 Fed. 721..... 7
Barker v. *Swenson*, 66 Tex. 408..... 67
Calhoun Gold Min. Co. v. *Ajax Gold Min. Co.*, 182 U. S. 499..... 10
Calhoun Gold Min. Co. v. *Ajax Gold Min. Co.*, 27 Colo. 1..... 15
Collins v. *Durwood*, 4 Tex. Civ. App. 389.... 67
Devlin on Deeds, Sec. 9..... 23
Devlin on Deeds, Sec. 15.....23-24
Goodright v. *Wells*, 2 Doug. K. B. 771..... 50
Hall v. *Russell*, 101 U. S. 503..... 63
Hill v. *Heard*, 104 Ark. 23.....35, 49, 52
Kelly v. *McGuire*, 15 Ark. 555.....27, 49, 65, 67
Kuhn v. *Fairmont Coal Co.*, 215 U. S. 349... 18
Nicholson v. *Halsey*, 1 Johns. Ch. 417..... 55
Robinson v. *Belt*, 107 U. S. 41..... 50
Selby v. *Alston*, 3 Ves. Jun. 339..... 55
Shulthis v. *McDougal*, 225 U. S. 561..... 6
Shulthis v. *McDougal*, 170 Fed. 529.....5, 6, 21, 60
Sizemore v. *Brady*, 235 U. S. 441.....19, 22, 60, 66
Wilson v. *Beckwith*, 140 Mo. 359..... 17
Woodbury v. *U. S.*, 170 Fed. 302..... 67

In the Supreme Court of the United States

October Term, 1914

Daniel A. McDougal, *Plaintiff in Error,* vs. Edmond McKay *et al.*, *Defendants in Error.*	**No. 676**

In Error to the Supreme Court of the State of Oklahoma.

Brief by Amici Curiae.

STATEMENT.

The parties to the record in the case at bar have by mutual consent treated this case as presenting but a single question, viz: Did Andrew J. Berryhill take an estate *ex parte paterna* in the allotment made to his heirs after his death, under

section 7 of the Supplemental Creek Agreement (32 Stat. L. 500), or is said allotment to be treated as a new acquisition in the said Andrew J. Berryhill? It is assumed by both parties that this allotment must be treated either as an ancestral estate or as a new acquisition *in Andrew J. Berryhill.*

It is our position that it is neither, but that it is a new acquisition in the *heirs* of Andrew J. Berryhill. If this latter position is to be presented to the court before the decision in the case at bar, it must necessarily be done by the briefs of *amici curiae.* Counsel for plaintiff in error can not be expected to advance this position, since if it is sustained the judgment of the court below must be affirmed. Counsel for defendant in error also reject this theory of the law and elect to stand or fall on the theory that the allotment must be treated as an estate coming to Andrew J. Berryhill by descent from his tribal parent. The position of counsel for defendant in error is frankly stated in that part of their brief devoted to a reply to the brief of John B. Meserve, Esquire, *amicus curiae.* At page 66 of their brief, counsel for plaintiff in error says: "Of course if this court should adopt the theory of the *amicus*

curiae, we win our case, and the judgment of the Oklahoma Supreme Court will be affirmed, but we would regard such a decision as extremely unfortunate. * * *." Again, at page 69 it is said: "We trust the court will have little difficulty in disposing of the contentions of the *amicus curiae*."

On some of the questions of the law involved we agree with counsel for plaintiff in error, on others we agree with Mr. Meserve, and we agree with Mr. Meserve in his conclusion that the land is a new acquisition, not in Andrew J. Berryhill, *but in his heirs*. However, we reach this conclusion by a somewhat different process of reasoning. It is not our purpose to burden the court with a repetition of the argument of other counsel. To a great extent this brief will be confined to the discussion of certain principles of law which we deem controlling, but which have not been presented in any of the other briefs on file in this case.

Our contentions may be briefly stated as follows:

1. Had Andrew J. Berryhill lived to receive an allotment he would have taken the same, not technically merely, but substantially, by purchase

from the United States and the Creek Nation, and not by descent from his tribal parent.

2. Had Andrew J. Berryhill lived to receive his allotment, he would have taken the same, as a new acquisition, by purchase from the United States and the Creek Nation, even if it be assumed for the purpose of the argument that he took an equitable or beneficial estate therein by descent from his tribal parent; because the source of the legal title is the controlling factor in determining whether an estate be a new acquisition or an ancestral estate.

3. Andrew J. Berryhill having died prior to the enactment of the legislation authorizing the making of an allotment to his heirs, and no estate, therefore, having vested in him, said allotment was not an acquisition, new or otherwise, in Andrew J. Berryhill; hence the allotment did not descend to his heirs either as an ancestral estate or as a new acquisition, under section 2531 of Mansfield's Digest, but vested in his heirs, under section 2522 of Mansfild's Digest, by direct grant from the United States and the Creek Nation, becoming a new acquisition in said heirs.

These three propositions will be discussed in the order stated. Before entering upon their discussion, however, we desire briefly to consider whether a rule of property has been established by the decision of the Circuit Court of Appeals for the Eighth Circuit in *Shulthis* v. *McDougal,* 170 Federal 529.

ARGUMENT.

No Rule of Property Has Been Established By the Decision of the Circuit Court of Appeals in Shulthis vs. McDougal, and the Decisions of the Supreme Court of Oklahoma Following It.

This supposed rule of property rests solely upon the authority of a single case *(Shulthis* v. *McDougal)* decided by an intermediate appellate court. It is true that the judgment of the Circuit Court of Appeals was final in that particular case, because diverse citizenship was the sole ground of jurisdiction of the Circuit Court. *Shulthis* v. *McDougal*, 225 U. S. 561. But the question involved was one which could only be finally settled by the decision of the Supreme Court of the United States. The decisions of the Supreme Court of the State of Oklahoma following *Shulthis* v. *McDougal* are likewise the decisions of a court which, as to such questions, is also but an intermediate appellate court. Not only this, but the decisions of the State Supreme Court are based *not* upon the independent judgment of the court, but upon the ground that the decision of the Circuit Court of Appeals established a rule of property. And these decisions of the Supreme Court of Oklahoma have not been accepted as establishing a rule of

property. They have been brought to this court for review, and are now before this court for its decision. That these decisions of these intermediate appellate courts, Federal and State, have not been accepted as establishing a rule of property is evidenced by the fact that as late as January 19th, 1915, the Supreme Court of Oklahoma was again called upon to pass upon the question in *Thorn* v. *Cone*. (See brief of defendant in error, pages 64 and 65.)

We do not believe that the learned Circuit Court of Appeals would itself treat its decision in *Shulthis* v. *McDougal* as establishing a rule of property. In *Anglo-American Land, M. and A. Co.* v. *Lombard*, 132 Federal 721, 741, Circuit Judge Van Devanter (now Mr. Justice Van Devanter of the Supreme Court), speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

> "The decision of the Kansas City Court of Appeals in *City of Goodland* v. *Bank*, 74 Mo. App. 365, is alone cited in support of this contention. A fixed and settled rule of decision in a state court of last resort establishes the law of the state in such manner as to bind the Federal courts in all matters controlled by the state law; but the opinions of intermediate appellate courts, like the Kansas City Court of Appeals, while entitled to great

> respect and regarded as persuasive authority, are not controlling upon the Federal courts, because they do not settle the law of the state."

In determining whether a rule of property has been established by the decisions of the Circuit Court of Appeals and by the Supreme Court of Oklahoma in the cases now before this court, it is important to consider the scope of those decisions. In no just sense can it be said that in *Shulthis* v. *McDougal* the Circuit Court of Appeals merely construed the Supplemental Creek Agreement and chapter 49 of Mansfield's Digest, and that therefore its decision was on a matter of merely local concern. The decision was much broader than that. It proceeded on the theory that the rights of the allottee were not created by the allotment act. The theory of the decision is expressed in 170 Federal at page 534, where it is said:

> "But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it can not be said that the property which passed to an allottee is a new right or acquisition by the allotment. The right to the property an-

tendates the allotment, and is simply given effect to by that act."

Thus it will be seen that the court's decision was upon a question of general concern, affecting not only the Five Civilized Tribes, but the Indians generally throughout the United States.

Not only is the decision on a matter of more than local concern on the general question of the origin of the rights of individual Indians in tribal land—the identical question here presented may arise with reference to Indian allotments in the other states. Section 5 of the Act of February 8th, 1887, 24 Stat. L. 389, provides for the issuance of trust patents declaring that "the United States does and will hold the land thus allotted, for a period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or to his heirs as aforesaid, in fee * * * "

The provision of section 2531 of Mansfield's Digest confining ancestral estates to the blood of the ancestor is merely a recognition of a rule of

common law, very generally in force in this country. It is apparent therefore that wherever this rule of the common law prevails the question of heirship to deceased Indian allottees under the Act of February 8, 1887, will be affected by the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal*, if it is followed by this court. This is a Federal question. Upon its determination hinges the question of the right to final patents under the Act of 1887. We submit, therefore, that no decision of any court other than the Supreme Court of the United States can be said to establish a rule of property on this question.

In *Calhoun Gold Mining Company* v. *Ajax Gold Mining Company*, 182 U. S. 499, it was held by this court that no rule of property was established by the decisions of the highest court of a state, construing sections 2322 and 2336 of the Revised Statutes of the United States, which deal with the rights of the locators of mining locations on public lands. In that case the Supreme Court of Colorado had overruled its earlier decisions construing these sections of the statute. It was insisted in the state court, and again in this court, that the earlier decisions of the state court had established a rule of property. In the opinion of

this court by Mr. Justice McKenna (p. 504) it is said:

> "The third proposition involves the relation of sections 2322 and 2336. It is first discussed by plaintiff in error, and is given the most prominence in the argument, and we, therefore, give it precedence in the order of discussion. It presents, for the first time in this court, the rights of a junior location of a cross vein within the side lines of a senior location under section 2336. Prior to the decision by the Supreme Court of Colorado in the case at bar that court had decided that the junior location was entitled to all of the ore found on his vein within the side lines of the senior location, except at the space of intersection of the two veins. *Branagan* v. *Dulaney* (1885), 8 Colo. 408, 8 Pac. 669; *Lee* v. *Stahl* (1886), 9 Colo. 208, 11 Pac. 77; *Morgenson* v. *Middlesex Min. and Mill. Co.* (1887), 11 Colo. 176, 17 Pac. 513; *Lee* v. *Stahl*, 13 Colo. 174, 22 Pac. 436. In *Coffee* v. *Emigh* (1890), 15 Colo. 184, 10 L. R. A. 125, 23 Pac. 83, it was held that the rule laid down in the foregoing cases had become established law. The claims of the plaintiff in error were located after the decisions, and it is contended that the rule laid down by them became a rule of property in the state, and it is earnestly urged that to reverse the rule now would take from plaintiff in error that which it 'had reason to believe was a vested right in the Victor Consolidated vein.'
>
> "There are serious objections to accepting that consequence as determinative of our judgment. *We might by doing so confirm ti-*

> *tles in Colorado, but we might disturb them elsewhere.* The statute construed is a Federal one; being a law, not only for Colorado, but for all of the mining states and, therefore, a rule for all, not a rule for one, must be declared. Besides, what consideration should have been given to prior cases, the supreme court of the state was better able to judge than we are. It may be that the repose of titles in the state was best effected by the reversal of the prior cases. At any rate, a Federal statute has more than a local application, and until construed by this court can not be said to have an established meaning * * * "

We submit that under this decision no rule of property has been established by the decisions of the Circuit Court of Appeals and the state court under consideration here. The question of the nature and extent of the rights of tribal Indians prior to the allotment of their lands in severalty is obviously a question of more than local concern. This is apparent when it borne in mind that the general allotment act of 1887 provides for the issuance of final patents to the heirs of deceased allottees according to the law of the state in which the allotments are located. It is clear that a decision holding that such allotments are to be treated in effect as having come to the allottees on the part of their tribal parents will effect the disposition of such lands by the government in all

states where the common law rule preserving ancestral estates in the blood of the ancestor prevails; and if such a ruling by this court is based upon the ground that a rule of property has been established by the decisions of the Circuit Court of Appeals for the Eighth Circuit, and of the Supreme Court of the State of Oklahoma, then the law has been settled governing estates outside of the Eighth Circuit by the decisions of the courts of another territorial jurisdiction.

These considerations, we submit, preclude the giving of controlling effect to the decisions of the Circuit Court of Appeals and of the Supreme Court of the State. If this be true, *a foritori*, do the same considerations preclude the giving of controlling effect to the views which may have been entertained by lawyers of the former Indian Territory? We concede that if the decision in *Shulthis* v. *McDougal* would otherwise establish a rule of property, the fact that it has not been accepted by the *nisi prius* courts, the bar, and the people generally, may properly be considered as a justification for the refusal of the court to accept it as such.

But the opinions of the members of the Oklahoma bar can have no greater effect than this.

Certainly they cannot of themselves establish a rule of property on a question of more than local concern. Hence we submit that the court will not allow its judgment to be controlled by such considerations as are urged on page 66 of the brief of defendant in error:

> "Of course if this court should adopt the theory of the *amicus curiae* we win our case, and the judgment of the Oklahoma Supreme Court will be affirmed, but we would regard such a decision as extremely unfortunate. It would introduce a new and novel element into the already complicated land title affairs in the Five Tribes. Heretofore there have been two theories: One that the allotment was a new acquisition, and the other that it is ancestral; and around those theories the controversy has raged. Now we have a new Richmond in the field * * * "

We submit that the fact, if it be a fact, that the controversy in Oklahoma has raged over the question stated by counsel in the above excerpt from their brief does not require the acceptance of one or the other of the two theories to which counsel seek to confine the attention of the court. I both of these theories overlook well settled rules of law, then certainly they ought not to be accepted, especially in view of the fact that the decision in this case must be of general and not merely local concern.

It must be assumed, we submit, that counsel in other states where these questions unquestionably have arisen in the past, have advised their clients according to established principles of law, and their clients have acted upon such advice. It would be unfair on a question of general concern to overturn transactions based upon such correct legal advice merely because a controversy may have been waged in a single locality between those holding to opposing theories, neither of which are supported by sound legal principles. We submit, therefore, that the question is not what opinions have been entertained by members of the Oklahoma bar—it is rather what are the established legal principles applicable to this situation.

If, as is conceded by counsel for defendant in error at page 66 of their brief, notwithstanding the decision in *Shulthis* v. *McDougal,* controversy has "raged" over the question decided in that case, the following quoted from the opinion of the Supreme Court of Colorado in *Calhoun Gold Mining Company* v. *Ajax Gold Mining Company,* 27 Colo. 1, 59 Pac. 607, 611, is peculiarly applicable to this case:

> "It is a matter of common knowledge that ever since the decision of this court on that

question its correctness has been doubted by many eminent members of the bar of this state familiar with mining laws, and has even been the subject of expression to that effect by this court. *Milling Co.* v. *Turner,* 23 Colo. 400, 48 Pac. 685, in which it is said, in speaking of the rights conveyed by patent to a mining claim, that it conveys all lodes or veins having their apexes within the boundaries of such claim except, perhaps, cross lodes. This doubt has been generally entertained by those engaged in mining so that, notwithstanding the length of time which has elapsed since the rendition of the first decision of this court on this question, it is safe to assume that it has not been implicitly relied upon as a sound exposition of the law relating to cross leads, and that, in the great majority of instances, parties have governed themselves accordingly. The law construed in *Branagan* v. *Dulaney* is an Act of Congress. The doctrine of *stare decisis* is based upon the assumption that the rules of law to which this doctrine applies have prevoiusly been determined by a court having final jurisdiction of the questions involved. For this reason, where the decision of a tribunal is subject to review by one having superior authority over it for that purpose, or the question determined may be passed upon by such tribunal in another case, the doctrine of *stare decisis* does not apply with full force until the same questions have been determined by the court of last resort. The construction of an act of Congress can not be said to be authoritively settled until passed upon by the highest court authorized so to do. This is the Supreme Court of the United States. It has never de-

cided the question regarding cross veins as presented in the case at bar. The decision of this court on that question may be reviewed by that tribunal; so that, although this court has given the statutes affecting cross lodes a construction which has since been followed in this state, nevertheless, as the same statutes are still open to construction by the highest tribunal of the land, their meaning on the subject of cross lodes as involved in this case has not been finally determined, so as to become *stare decisis.* In Arizona, California and Montana a different construction regarding the rights of cross-lode claimants has been given from that announced by the Supreme Court of this state. *Mining Co.* v. *Leach* (Ariz.), 33 Pac. 418; *Wilhelm* v. *Sylvester,* 101 Cal. 358, 35 Pac. 997; *Pardee* v. *Murray,* 4 Mont. 234, 2 Pac. 16. Whether or not the reasons given for this conclusion are sound is not material. Sooner or later this question may be determined by the Supreme Court of the United States, and when it is, the law thus settled must be followed by all the courts of the states and territories in which the act in question is in force. For these reasons we conclude that, although this court has passed upon the identical question regarding cross veins now involved, it is not precluded from again considering it, under the doctrine of *stare decisis,* or that the law as announced by this court in previous cases has become a settled rule of property in this state; and if, upon a reconsideration of such question, we conclude that our previous decisions thereon were wrong, we should not wait for a superior tribunal to so declare." In *Wilson* v. *Beckwith,* 140 Mo. 359, 41 S. W. 985, it was held (first point of syllabus) that:

> "The Supreme Court may reconsider and overrule an opinion announced on a former appeal respecting title to real property, especially where vast property rights are involved, and where it is improbable that many titles were acquired on the strength of the former opinion."

Mr. Justice Gantt, delivering the opinion of the court *in banc* said:

> "In as much, then, as this case involves a question of title that may and probably will affect the ownership of at least 10,000 acres of land similarly situated, and the litigation has been kept alive during all the time that has elapsed since the former opinion, it cannot with much confidence be asserted that it has been accepted or acquiesced in so as to have become a rule of property; certainly not one of very long standing. Few titles, under the circumstances, can reasonably be presumed to have been acquired on the strength of the opinion rendered on the former appeal."

It must be remembered that in the case at bar the rights of the parties were acquired before the decision of the Court of Appeals in *Shulthis* v. *McDougal.* In *Kuhn* v. *Fairmont Coal Company,* 215 U. S. 349, 361, it was decided that the Federal courts are not bound by the decisions of the highest court of a state on a question of state law where the rights of the parties to the litigation in the Federal court accrued prior to

the decision of the question by the state court. Mr. Justice Harlan, speaking for the court, said (page 361):

> "Whether such a case involves a rule of property in any proper sense of those terms, or only a question of general law, within the province of the Federal court to determine for itself, the fact exists that there had been no determination of the question by the state court before the rights of the parties accrued and became fixed under their contract, or before the injury complained of. In either case, the Federal court was bound under established doctrines to exercise its own independent judgment, with a leaning, however, as just suggested, for the sake of harmony, to an agreement with the state court, if the question of law involved was deemed to be doubtful."

And finally, as we shall undertake to show at another place in this brief, the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal* is in conflict with the decision of this court in *Sizemore* v. *Brady,* 235 U. S. 441.

Had Andrew J. Berryhill Lived to Receive an Allotment, He Would Have Taken the Same, Not Technically Merely, But Substantially, by Purchase From the United States and the Creek Nation, and Not by Descent From His Tribal Parent.

The first question presented for consideration is as to the nature and character of the estate of a Creek citizen allotted to him in severalty under the acts of Congress on the subject. Is such estate a new acquisition, or is it an ancestral estate coming to the allottee on the part of his tribal parent? For the purpose of the discussion of this question we shall deal with it as if Andrew J. Berryhill had lived to acquire an allotment—reserving for later consideration the question of the effect of his death, and the making of the allotment, not to him, but to his heirs. Our first effort will be to show that an allotment made to or for a Creek citizen can not be said to come to such citizen by his tribal parents, and that had Andrew J. Berryhill lived to receive an allotment he would have taken the same, substantially as well as technically, by purchase from the Creek Nation and the United States, and that the same would have been a new acquisition in the said Andrew J. Berryhill.

This contention is of course opposed to the conclusion and judgment of the court below. The decision of the court below is rested upon the authority of *Shulthis* v. *McDougal*, 170 Fed. 529, and the reasoning in that case is relied upon by defendant in error in support of the judgment in the case at bar. Therefore our attention will first be directed to that decision.

The theory of *Shulthis* v. *McDougal* is that while technically the allotment made to or for a Creek citizen does not descend to him from his tribal ancestors, nevertheless his right thereto antedates the allotment, and that for practical purposes it may be said that he inherits the same from his tribal parents. Counsel for defendant in error concedes that technically the allotte takes by purchase, but insists that "substantially" he takes by inheritance from his tribal parents, and that therefore his estate must be treated as an ancestral estate coming to him on the part of his tribal parent or parents.

It is most respectfully urged that there are several obstacles in the way of the acceptance of this position. It is based upon the assumption that the allotment of these lands was in effect the partition of an estate between tenants in com-

mon. This theory would seem to be in conflict with the view repeatedly expressed by this court, which was last stated in *Sizemore* v. *Brady*, 235 U. S. 441, as follows:

> "Anterior to the legislation which we must consider, the Creek lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise, the right was at an end. It was neither alienable nor descendible."

However, in the view we take of this case it is immaterial whether these tribal lands be treated as having belonged to the tribe as a community, or to its members as tenants in common. Let us assume for the purpose of this discussion that these lands were in fact held by the citizens of the tribe as tenants in common. If so, Andrew J. Berryhill must be treated as one of these tenants in common. This is recognized by counsel for defendant in error at page 8 of their brief, where it is said:

> "The lands were to be allotted in severalty by the Commission only to citizens whose names appeared upon the authenticated and approved rolls of citizenship. These rolls of

citizenship made up the aggregate list of units to whom the lands of the Creek Nation were to be set apart and conveyed. The dead citizen *was*, however, the *unit of allotment*, and so held by the Secretary of the Interior in a written opinion."

If, therefore, the allotment of these lands be treated as a partition thereof among tenants in common, according to the theory of defendant in error, Andrew J. Berryhill must be treated as one of the *units* of allotment or partition.

What is a partition of land between tenants in common?

"At common law the conveyances called original or primary, by which an estate was first created, included feoffment, gift, grant, lease, exchange and partition. * * * ."

Devlin on Deeds (3rd Ed.), Sec. 9.

"Partition is a division of real estate made between joint owners, such as co-parceners, joint tenants, or tenants in common. When partition was made between joint tenants or tenants in common, a deed was required, and in every case livery of seisin was necessary. [Citing 2 Blackst. Com. 324.] In a legal sense the word 'partition' means 'the act or proceeding through which two or more *co-owners* caused the thing to be partitioned, to be divided into as many shares as there are owners, and which vest in each of such persons a specific part, with the right to possess it, free from a title right in other persons who before

> partition had an equal right to possess.' It is a separation between joint owners or tenants in common of the interests held in land by them respectively, and a setting apart of such interests so that they may enjoy and possess the same as owners in severalty."

Obviously when land is partitioned the parties accepting their respective portions in severalty relinquish all interest they may theretofore have had in the shares set aside in severalty to their co-owners. This relinquishment is not a gift. The share set aside to each party in severalty is a full consideration for the relinquishment of his former interest in common.

The so-called partition or allotment of the lands of the Creek Nation was made under the act of Congress commonly known as the Original Creek Agreement (chapter 676, 31 Stat. L. 861), as amended by the supplemental agreement. These agreements were not only acts of Congress, but they were ratified by the tribe. Sec. 23 of the Original Agreement reads as follows:

> "Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who

has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

"The principal chief shall, in like manner and with like effect, execute and deliver to proper parties deeds of conveyance in all other cases herein provided for. All lands or town lots to be conveyed to any one person shall, so far as practicable, be included in one deed, and all deeds shall be executed free of charge.

"All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his deed.

"Any allotee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title, and interest in and to the same, except in the proceeds of lands reserved from allotment.

"The acceptance of deeds of minors and incompetents, by persons authorized to select their allotments for them shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein.

"The transfer of the title of the Creek Tribe to individual allotees and to other persons, as provided in this agreement, shall not inure to

the benefit of any railroad company, nor vest in any railroad company, any right, title or interest in or to any of the lands in the Creek Nation.

"All deeds when so executed and approved shall be filed in the office of the Dawes Commission, and there recorded without expense to the grantee, and such records shall have like effect as other public records."

It must be assumed, we take it, in the absence of evidence to the contrary, that the tribal parent of Andrew J. Berryhill accepted an allotment for himself under this agreement. By so doing he must be deemed to have relinquished any right, title or interest he may have had in or to the remaining lands of the Creek Nation, including the 160 acres alloted to the heirs of Andrew J. Berryhill.

It is clear that the estate in severalty set apart to a tenant in common by partition proceedings can not ordinarily be said to have come to him either by descent, or by gift from his co-tenants. If such estate in severalty so partitioned off to a party can be held to be an ancestral estate, it can only be on the theory that his estate as a tenant in common came to him as an inheritance from his ancestor, and that therefore his estate in severalty

under the partition proceedings retains the same character.

Can it be said that Andrew J. Berryhill inherited from his father an estate as tenant in common in these tribal lands? We submit that it can not, either technically or substantially. In consideration of this question the distinction between membership in the tribe or *tribal* blood and *family* blood must be observed. The very fact that estates which, in the language of the statute, "come by the father" or "come by the mother" are styled *ancestral* estates is indicative of their character as estates coming from the father or mother, or persons of the family blood of such parents.

The statute itself is unambiguous. Sec. 2543 reads as follows:

> "The expression used in this act, 'where the estate shall have come to the intestate on the part of the father,' or 'mother,' as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise or descent from the parent referred to or from any *relative* of the blood of such parent."

And in *Kelly's Heirs* v. *McGuire's Heirs*, 15 Ark. 555, the court said:

> "The expressions 'come by the father' or 'mother' or on the 'part of the father' or

'mother' mean the same thing. They are familiar to, and derived from the common law, having an appropriate technical meaning which we must suppose the legislature intended to adopt. They embrace not only the father, but all of the *ancestors* of the father, both paternal and maternal. * * *

"The expression then 'come by the father' or 'mother' is not limited to an estate acquired by descent merely, but includes an estate which comes to the intestate by gift, devise or descent from the parent referred to, or from any *relation* of the blood of such parent. Such is the letter and spirit of the statute. * * *

"If the son should purchase land from the father or mother for a valuable consideration, it would be a new acquisition and descend as such; because nothing is received by way of bounty at the hands of ancestors, which is the case as to lands descended from or derived or given by them to the intestate, and it was thought reasonable that they should remain in the blood from which they came."

If for the purpose of fixing the character of ancestral estates upon these allotments, tribal blood or tribal membership might be substituted for the family blood required to constitute an ancestral estate under the Arkansas statute, then we submit that consistency would require that the same substitution of tribal blood or tribal membership in place of the family blood con-

templated by the Arkansas statute should be made in determining the heirs, and that all persons of the tribal blood or membership should be deemed to be of the blood from whence the estate came, although not of the family blood of the allotee, and that therefore *all* such persons of tribal blood or membership should be deemed to be the heirs of the allotee as to such so-called ancestral estate. If the substitution of tribal blood for family blood be warranted, then clearly under the Arkansas statute all relatives of the allotee not of the tribal blood would be excluded from taking such allotments as heirs of the allotee. Clearly this was not intended. This court has held that such non-citizen relatives are not excluded.

Section 6 of the Supplemental Creek Agreement is inconsistent with any such intent on the part of Congress. It contains this proviso:

> "Provided, that only citizens of the Creek Nation, male or female, and their Creek descendants shall inherit lands of the Creek Nation: And provided further that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

The contingency mentioned in this proviso is one that could not possibly arise if the statute

substitutes tribal blood or membership for the family blood of the Arkansas statute. If such tribal blood or membership be substituted for family blood, then clearly non-citizens heirs could only take in the event that all persons of Creek citizenship should become extinct—so remote a possibility that it is impossible to conceive of Congress providing for the taking by non-citizen heirs in that contingency. It is clear, we submit, that Congress never intended that tribal blood or membership should by analogy be treated as the equivalent of family blood in the construction of the Arkansas statute of descent and distribution.

As we shall presently show, it is well settled that an estate is not an ancestral estate unless it comes *wholly* by descent, devise or gift from the ancestor. If the father of Andrew J. Berryhill ever had an estate as tenant in common in the tribal land, the allotment act recognized this estate as tenant in common only to the extent of entitling him to his own allotment in severalty, and expressly provided that the acceptance of such allotment should extinguish his right, title and interest in and to all other lands of the tribe (as tenant in common, or otherwise), "except in the *proceeds* of lands reserved from allotment." It can not be

said, therefore, that the Andrew J. Berryhill allotment was a portion of the estate as tenant in common of his father, or that it came to the heirs of Andrew J. Berryhill on the part of the father of the latter, since whatever interest the father may have had prior to the allotment was exhausted when he took his own allotment, leaving nothing to descend to Andrew J. Berryhill or any other of his heirs.

It is true that the interest of Andrew J. Berryhill's father, as a member of the tribe, in the *proceeds* of lands reserved from allotment was somewhat diminished by the making of an allotment to the heirs of Andrew J. Berryhill, and to the heirs of other deceased members of the tribe who came within Section 28 of the Original Creek Agreement, or Section 7 of the Supplemental Agreement. It is clear, however, that the pro rata share contributed by the father of Andrew J. Berryhill to the making of these allotments was infinitesimal. And the allotment to the heirs of Andrew J. Berryhill was only one of many made to the heirs of deceased members of the tribe under Section 28 of the Original Agreement, and Section 7 of the Supplemental Agreement. *De minimis non curat lex.*

It is clear that Andrew's father contributed no more to this allotment than did any other enrolled citizen of the tribe, whether Indian or freedman, and that he contributed no more to the making up of Andrew J. Berryhill's allotment than he did to the allotment of any other of the members of the tribe, whether of Indian or freedman blood to whose heirs allotments were made under the aforesaid provisions of the Original and Supplemental Creek Agreements. It is clear that, as a tenant in common, he contributed no more to the allotment of Andrew J. Berryhill than the heirs of Andrew J. Berryhill, also to be treated as a tenant in common, contributed to the father's allotment.

Not only were these several tenants in common of the lands out of which these allotments were carved not of the same family blood; they were not even of the same race. A portion of the members of the tribe were Indians by blood; the remainder (the freedmen) were of African race. Can it be said that an allotment carved for the heirs of Andrew J. Berryhill out of an estate held in common by the members of the tribe, most of whom were in no wise related to his father, and a large portion of whom were not even of the same race, was an ancestral estate coming to An-

drew J. Berryhill on the part of his father? Is there even any analogy between such an allotment and an ancestral estate? There is only one possible theory on which it could be contended with any show of reason that these allotments were made out of ancestral estates in common. That would be on the theory that the members of the tribe at the time these lands were acquired took as tenants in common *in equal shares,* and that upon the death of each member his interest descended to his heirs; that these heirs took what the original ancestor had, and nothing more. On this theory the proportionate shares of the members of the tribe living at the time of the allotment would have been unequal. The sole heir of one of the original members would own the entire share of his ancestor. The descendants of those of the original members who had been more prolific would of course have much smaller shares. This would necessarily be the case if the estates of the so-called tenants in common at the time of allotment should be treated as having descended to them from their respective ancestors. If this theory could be accepted, then it would necessarily follow that when allotments were equalized, those members of the tribe who

came of the more prolific ancestry, and whose proportionate shares would therefore be smaller, would receive a part only of their estate from their ancestors, the remainder being made up out of the shares of the other members of the tribe. As an illustration let us suppose that at the time the tribe acquired these lands there were 100 members, none of whom were related to each other, each holding as a tenant in common, an undivided 1-100 interest in the tribal lands. Let us suppose that at the time of the allotment one-half of these original members were represented by 100 descendants each and the other half of the original members were represented by one descendant each. In such a case it is apparent that if allotments should be equalized (as was actually done) the living representatives of the first class of original members would receive approximately only one-half of their respective shares by descent from their respective ancestors, the other half being made up out of the shares originally owned by the original members of the second class. Could it be said that the lands furnished by the descendants of the second class to equalize the allotments of their less fortunate fellow citizens were lands coming to such fellow citizens by descent from their ancestors? Clearly not.

The allotment to the heirs of Andrew J. Berryhill was made out of land to which the father of Andrew J. Berryhill had no claim whatever, except his pro rata share as a member of the tribe in the proceeds of the sale of the land in the event that, instead of being allotted to the heirs of Andrew J. Berryhill it should be reserved from allotment. Certainly it can not be said that this allotment came to the heirs of Andrew J. Berryhill "substantially" by descent from Andrew's father. It is conceded by counsel for defendant in error that technically the heirs of Andrew J. Berryhill took by purchase from the Creek Nation and the United States. In *Hill* v. *Heard*, 104 Ark. 23, 144 S. W. 254, 42 L. R. A. (N. S.) 446, Ann. Cas. 1914 C. 403, the Supreme Court of Arkansas, construing the identical statute here under consideration, held that an estate is not an ancestral estate, although the ancestor may have had an equitable estate in the land, where the intestate acquired the legal estate by purchase from another and any substantial portion of the purchase price of the land came from a source other than the ancestor. The question under consideration was the sole question involved in *Hill* v.

Heard; and we quote in full the opinion of the court delivered by Mr. Justice Frauenthal:

"This is an action of ejectment, instituted by appellee for the recovery of a tract of land situated in Conway County. It is conceded by both parties that the land was owned by one James Montgomery Heard (who, for brevity, will be hereafter referred to as Montgomery Heard), who died intestate and without issue, leaving his mother as his only surviving parent, who also died prior to the institution of this suit. The appellee claims that the land was an ancestral estate coming to said Montgomery Heard on the part of the father, and that she inherited it from him by reason of the fact she is his sole surviving paternal grandparent. The appellant claims that the land was obtained by Montgomery Heard as a new acquisition, and that the title passed to his half-brothers and half-sisters, who are appellant's children.

"The land was purchased by James B. Heard in January, 1894, from one Richard Brooke, at the price of $1,550, for which he executed four notes for the sum of $387.50 each, due, respectively, on the first of January, 1895, 1896, 1897 and 1898. At the same time Brooke executed to him a bond for title, by which he agreed to convey said land to him by deed upon the payment of said notes. Under said purchase, Heard went into possession of and occupied said land as his homestead until his death, which occurred on May 28, 1895. He died intestate, leaving surviving him his widow, Edna, and one child, the said Montgomery, who was then from three to four months old. In April, 1897, the widow, Enda,

married the appellant, Robert L. Hill, by whom she had six children. Montgomery Heard died intestate and without issue, in September, 1908, and his mother died in September, 1911. There is a conflict in the testimony relative to the question as to who paid the various notes executed by James B. Heard for the purchase money of the land. The testimony upon the part of the appellee tended to prove that the first maturing note was paid by the maker in his lifetime at or about its maturity, and that the other three notes were paid after his death by his widow, Edna, out of moneys derived partly from some personal property left by the said James B. Heard, and from a tract of land also left by the said intestate, which brought $150, and principally from the rents and proceeds of the crops made upon the land in controversy by the widow and those working for her. The testimony on the part of the appellant tended to prove that the last note was paid by the appellant out of his own money. But this testimony also tended to prove that he collected rents and profits of the land during the year in which he made the payment, which amounted to as much as said note. Upon the payment of the last note, the vendor, Brooke, in November, 1897, executed a deed by which he conveyed the land to said Montgomery Heard.

"The case was tried by the court sitting as a jury, who found that the land was an ancestral estate coming on the part of the father to said Montgomery Heard, and that, upon his death without issue and the death of his mother, the land ascended to his paternal

grandmother, and judgment was entered accordingly.

"The sole question involved in this case for determination is, What was the character of the estate acquired by Montgomery Heard in this land? That is, was it ancestral or a new acquisition? If it was an ancestral estate, coming by the father, then upon the death of the said Montgomery intestate and without issue, and the termination of the homestead interest of the mother by her death, the land ascended to his grandmother in the line of his father, in exclusion of his brothers and sisters of the half blood. On the other hand, if the land was a new acquisition, then upon the death of said Montgomery and his mother, the land passed by descent to his brothers and sisters of the half blood. Kirby's Dig., Secs. 2645-2647; *Kelly* v. *McGuire*, 15 Ark. 555.

"When the father, James B. Heard, purchased the land from Brooke and obtained from him a bond for title, he acquired an equitable estate in the land. The legal title to the land, however, was still in the vendor. The equitable estate thus obtained by a vendee is such an interest in land as will, upon his death, descend to his heir. As is said in 1 Pomeroy, Eq. Jur., Sec. 368, in speaking of the interest which a vendee under bond for title obtains in land: 'He may convey or encumber it, may devise it by will. On his death intestate, it descends to his heirs, and not to his administrators.' *Stubbs* v. *Pitts*, 84 Ark. 160, 104 S. W. 1110. It follows that upon the death of said James B. Heard the equitable estate in this land passed by descent to his sole child and heir, the said Montgomery, subject to the homestead rights of the widow

and of himself as minor. Thereafter Montgomery obtained the legal estate and title to the land by virtue of the conveyance executed to him by the vendor, Brooke. The question then arises as to how Montgomery obtained this legal title—whether by or on the part of his father, or by purchase—and, if by purchase, then the question recurs, what was the character of the estate which he then acquired when the equitable title and legal title to the land were thus united in him, the one by inheritance and the other by purchase? Was the land thus acquired ancestral or a new ecquisition?

"In the case of *Kelly* v. *McGuire, supra*, the entire subject of the descent of real estate as fixed by our statute was fully discussed and considered. The construction placed upon our statute of descent by that decision has been uniformly followed by this court, and the decision has become a rule of property. In considering the provision of the statute relating to ancestral estates, it was there said that its manifest intention was to preserve ancestral estates in the line of blood from whence they came. In speaking of this provision, the court said: 'It was a partial adoption or recognition of the common-law principle which invariably followed the line of the blood.' It has been the policy of our law, as evidenced by statutory enactments, to get away from the rules and canons of the common law relative to the descent of property. But the provision in our statute of descent relative to ancestral estates seems to have preserved to some extent a portion of such rules. At common law, after a failure of lineal descendants of the last

owner, the land, on account of feudal reasons, passed to his collateral relations, provided they were of the blood of the first purchaser by whom the land came to the intestate. 2 Bl. Com. 220; 2 Tiffany, Real Prop., Sec. 432. So, by this provision of our statute, if the land came to the intestate by gift, devise, or descent from an ancestor, it shall pass to such kindred only as are of the blood of the ancestor by or on the part of whom it was derived by him. In speaking again of this provision of the statute of descent relating to ancestral estates, this court, in the case of *West* v. *Williams*, 15 Ark. 682, said that, in order to carry out the intention of the legislature to preserve such estates in the line of the blood, 'the same means must be resorted to that were used at common law to make it effectual as to descended estates.' It will thus be seen that, in the interpretation of this section of the statute of descent, the court recognized it as a partial adoption of common-law principles, and considered it according to the rules of the common law relating to such succession. In order, therefore, to determine what is the rule of succession when the legal and equitable estate in land come from different channels and unite in the same person, we should resort to the same source for the interpretation of this phase of the statute. According to this, the descent of land is controlled by the legal title. The character of the estate in the holder, therefore, is determined by the course of the legal title coming to him. The leading case on this doctrine is *Goodright ex dem. Alston* v. *Wells*, 2 Dougl. K. B. 711, which was tried before Lord Mansfield, and in which it was held that, 'if the legal interest in land descended in fee sim-

ple *ex parte materna*, and the equitable interest in fee-simple *ex parte paterna*, or *vice versa*, the equitable estate shall merge into the legal, and both follow the line through which the legal estate descended.' The doctrine thus announced has been followed in this country. In the case of *Nicholson* v. *Halsey*, 1 Johns. Ch. 417, Chancellor Kent held that 'where the legal and equitable estates in land, being co-extensive, unite in the same person, the equitable is merged into the legal estate, which descends according to the rules of law.'

"In that case A, having paid money for the purchase of land, died before any conveyance was made, and B afterwards took a conveyance of the land in trust for the infant daughter of A, to whom he afterwards executed a deed in fee, and it was held that she acquired the legal estate by purchase, and, on her death without issue, the estate descended to her brothers and sisters of the half blood, to the exclusion of her paternal uncle. In Walker's American Law, 11th Ed. 409, the author says: 'In determining what is ancestral property the legal title controls. It is paramount to the equitable title. * * * Thus, if the legal and equitable titles come by separate channels to unite in the same person, the latter is merged in the former, and follows the course of descent that an exclusively legal derivation would have dictated.' In 27 Am. & Eng. Enc. Law, 2 Ed., 303, the rule is thus stated by the writer of the article therein, and this rule appears to be well sustained by the authorities there cited: 'Where the legal and equitable estate in the land comes through different channels, and in different modes, it has been held that it is the

course of the legal, rather than the equitable, estate which determines whether it be an ancestral estate in the holder.' *Selby* v. *Alston*, 3 Ves. Jr. 339, 4 Revised Rep. 10; *Wells* v. *Head*, 12 B. Mon. 166; *Shepard* v. *Taylor*, 15 R. I. 204, 3 Atl. 392; *Holme* v. *Shinn*, 62 N. J. Eq. 1, 49 Atl. 151; *Stembel* v. *Martin*, 50 Ohio St. 495, 35 N. E. 208; *Russell* v. *Bruer*, 64 Ohio St. 1, 59 N. E. 740. In the case of *Higgins* v. *Higgins*, 57 Ohio St. 239, 48 N. E. 943, the principle as to the determination of the succession of land wherein the legal and equitable titles have come to an intestate from different sources is thus stated: 'In determining questions as to the descent of real property, regard is had to the legal title only; and, where the legal title is acquired by purchase and the equity in the property by inheritance, the legal title and equitable interest at once unite, and, upon the death of the owner, the descent of the property will be cast as an estate which came by purchase.' In that case John Higgins agreed to sell James Higgins two hundred acres for $6,000, to be paid in installments, and deed to be made on payment thereof. Possession was delivered to the vendee, who afterwards died, leaving a widow and infant child, named Darlton, and also brothers and sisters. Afterwards the court required John Higgins to execute a deed to the said Darlton on the payment of the balance of the purchase money, amounting to $2,000. Darlton thereafter died intestate without issue, and it was there held that the land which he had thus obtained was a new acquisition and descended accordingly. See *Hogan* v. *Finley*, 52 Ark. 55, 11 S. W. 1035; *Wheelock* v. *Simons*, 75 Ark. 19, 86 S. W. 830.

"In the case of *Kelly* v. *McGuire, supra,* it was definitely determined when land was ancestral and when a new acquisition, but the consideration there was only of legal estates. It was there said that when land comes by gift, devise, or descent, either mediately or immediately from the father or mother or from any person in their respective lines, it is an ancestral estate; and where the land is acquired by the intestate by his own exertions and industry or is derived from any source other than descent, devise, or gift from father or mother, or any relative in the paternal or maternal line, then it is a new acquisition. It has, however, been held by this court that, in order to constitute land an ancestral estate it is not necessary that it come directly from the ancestor by deed or gift. It is sufficient to make the land ancestral if the ancestor advances the entire purchase money, and takes the deed in the name of his son. In the case of *Galloway* v. *Robinson,* 19 Ark. 396, it was held that 'where the father advances the money for the purchase of land and takes the deed in the name of the son, upon the death of the son without issue, the lands vest in the father in fee. In such case, the lands came to the son "on the part of the father" by gift, and were not a new acquisition by the son within the contemplation and meaning of the act of descent and distribution of this state;' and this ruling was recognized in the case of *Cotton* v. *Citizens Bank,* 97 Ark. 568, 135 S. W. 340. See also *Magness* v. *Arnold,* 31 Ark. 103. But in all these cases the legal title came from or on the part of the father, and with no consideration other than that coming from him. In the case at bar only the equitable title

came from the father, and the entire consideration of the land did not come from him. If the entire purchase money had been paid by the father, or had been paid by his administrators, out of his property, then, under the principle of the above cases the land would have come to the son by or on the part of the father. *Frick Coke Co.* v. *Loughead*, 203 Pa. 168, 52 Atl. 172. However, in this case the legal title came to the intestate, Montgomery, from Brooke; and if any substantial portion of the purchase money of the land came from any source other than the father, the land did not come by or on the part of the father to him. In such event, the equitable and legal title came to the son, Montgomery, by different modes and through different channels. The land came partly by title and consideration derived from a source other than by descent to the son from the father. The land was the homestead of the father, and, upon his death, the rents and profits arising therefrom became the property of his widow and minor child. Kirby's Dig., Sec. 3882; *Gainus* v. *Cannon*, 42 Ark. 503; *Smith* v. *Scott*, 92 Ark. 143, 122 S. W. 501. If it should be held that the rents of the land coming to the minor child were derived from the father, still the rents acquired by the widow became her separate property. The widow also became the owner of a portion, if not all, of the personal property left by the father. These rents and his personal property which came to the widow from the estate of James B. Heard became her absolute and separate property, and when this property of the widow or the proceeds thereof was paid on the land for the benefit of the son, it came to the son not from the father but from

the mother. According to the undisputed evidence, the rents and personal property which were thus owned by the mother were used in paying a great portion of the purchase money of this land. This portion of the consideration of the land came from a source other than from the father to the son. It follows, therefore, that the legal title to the land came to the son from a source other than from the father, and also that a substantial part of the consideration for the land, according to the undisputed evidence, came from a different source. In the case of *Martin* v. *Martin*, 98 Ark. 93, 135 S. W. 348, we said: 'In order to constitute a gift from a parent to a child, an ancestral estate within the meaning of our statute, the conveyance must be entirely in consideration of blood, and without any consideration deemed valuable in law; and, if such a deed is executed partly for a valuable consideration, the estate acquired is a new acquisition.' In like manner, in order for the land to be ancestral in coming by descent from the father, it must come wholly from the father, and without any pecuniary equivalent from any other source. If it comes in any other way, whether by purchase or gift, from a source other than from the father, then it is not an ancestral estate but a new acquisition.

"In the case at bar, one-fourth of the consideration for the land was paid by the father. After his death three-fourths of the purchase money was paid, and a great portion thereof was paid by the mother, and out of her separate property. This portion of the consideration did not come to the son by descent on the part of the father, or through his estate,

but came to him from the mother, and out of her separate property. The legal title obtained by the son from the vendor was acquired by a consideration obtained from a source other than from the father, and therefore by purchase, and not by descent. The two estates which thus united in the son came by different rights—the equitable estate by inheritance and the legal estate by purchase. The equitable estate, therefore, merged into the legal estate, and the rule of succession to the land must be determined solely by the course of the legal estate. The legal estate was not obtained by descent but by purchase, and the land acquired by the said Montgomery was, therefore, not ancestral, but a new acquisition. It follows that, upon the death of said Montgomery intestate and without issue, and the termination of the homestead right by the death of his mother, the land descended to his brothers and sisters of the half blood. The court erred in the judgment which it rendered.

"The judgment is accordingly reversed, and this cause is remanded for a new trial."

It will be noted that in *Hill* v. *Heard* some emphasis is laid upon the fact that not only the legal estate, but a substantial portion of the purchase money came from a source other than the ancestor, and the court declared that had the ancestor furnished all of the purchase money the result would have been different. This declaration of the rule that court would have applied had the ancestor possessed an equitable estate fully paid for, was of

course unnecessary to the decision of the case. As we shall hereinafter undertake to show, the source of the legal title would govern in the determination of the question of the ancestral character of the estate, regardless of the extent of the equitable estate of the ancestor. But it is submitted that it is so clear that no substantial beneficial interest in this allotment can be said to have come to the heirs of Andrew J. Berryhill through the father of the latter, that this declaration of the Arkansas court might be followed, and still there would be no ground for treating the allotment as an ancestral estate.

Before leaving this question we desire briefly to notice the argument of the defendant in error that while the title to the tribal lands was in the tribe as a political entity, and not in the individual members or citizens, nevertheless "the right of occupancy was in the individual citizens and enjoyed by them in severalty. The tribe as a political entity possessed the title, or possessed a base fee as stated by the opposing counsel. Nevertheless the use and occupancy of the tribal domain was held and enjoyed in severalty, and that part of the tribal domain occupied by a citizen consti-

tuting his home was descendible to his heirs, and when thus segregated from common occupancy constituted a right as sacred as the fee simple absolute title of the whites."

There are several answers to this argument. In the first place this right of occupancy was extinguished when the lands were allotted. In the next place there is no showing, we take it, that the father of Andrew J. Berryhill had any occupancy right in the particular land allotted to the heirs of Andrew J. Berryhill. It is to be presumed that if Andrew's father occupied any part of the tribal domain as his home, he selected this part for his own allotment, at least to the extent that the allotment act allotted to him.

Had Andrew J. Berryhill Lived to Receive his Allotment, He Would Have Taken the Same, as a New Acquisition, by Purchase from the United States and from the Creek Nation, Even if it be Assumed for the Purpose of the Argument that He Took an Equitable Estate Therein by Descent from His Tribal Parent, Because the Source of the Legal Title is the Controlling Factor in Determining Whether an Estate be a New Acquisition or an Ancestral Estate.

Assuming now for the purpose of argument only that all of the beneficial interest in the allotment to the heirs of Andrew J. Berryhill came by descent from the tribal parent of the said Andrew J. Berryhill the fact that the legal estate came to the heirs by purchase from the Creek Nation and the United States precludes the holding that said allotment is an ancestral estate. In *Kelly's Heirs* v. *McGuire's Heirs,* 15 Ark. 555, and again in *Hill* v. *Heard, supra,* it was declared that the statute regulating the descent of ancestral estates "was a partial adoption or recognition of the common law which invariably followed the line of the blood," and (quoting from *Kelly's Heirs* v. *McGuire's*) "the expressions 'come by the father' and 'come by the mother' or 'on the part of the father' or 'mother' mean the same thing. They are familiar to and derived from the common law,

having an appropriate, technical meaning, *which we must suppose the legislature intended to adopt.*"

It has been held by this court that the extension of the Arkansas statutes to the Indian Territory carried with them the construction theretofore placed thereon by the Supreme Court of Arkansas. *Robinson* v. *Belt*, 107 U. S. 41. The language of this statute "come by the father" and "on the part of the father," etc., having been construed before their extension to the Indian Territory as having the technical meaning of the same terms at common law, let us turn to the decisions for the purpose of ascertaining, if possible, what that meaning was as applied to this situation. In the first case in the Court of King's Bench in which this question arose, it was held that where the equitable estate descends from the father, and the legal estate in the same lands descends from the mother, the equitable estate merges in the legal estate, and the estate must therefore be held to be an estate coming on the part of the mother. The case to which we refer is *Goodright* v. *Wells*, 2 Douglas 771, decided in 1781. It will be noted in that case the father from whom the equitable estate descended had paid for the estate—

nothing came from the mother except the bare legal title. The decision is stated in the head-note as follows: "If the legal interest in land descend in fee-simple, *ex parte materna,* and the equitable interest in fee-simple *ex parte paterna,* or *vice versa,* the equitable estate shall merge in the legal, and both follow the line through which the legal estate descended." The facts are stated as follows:

> "James Selby, Serjeant at Law, agreed for the purchase of the estate in question and paid for it, but died before any conveyance was made of it to him, having by his will (made subsequent to the agreement) devised — 'All the rest of my real and personal estate whatsoever, and wheresoever, to my said wife in trust, that she do thereout educate and maintain my said son, until he shall attain the age of twenty-one years, and until he shall have sufficiently settled and secured to, and upon my said wife, what is to be settled upon and given to her as aforesaid, and afterwards in trust, to convey and dispose of all the then rest of my real and personal estate, and the produce thereof to my said son, his heirs, executors and assigns; but in case my said son shall die without issue, before he shall attain his said age of twenty-one years, then in trust, etc. * * *.'" After the testator's death a conveyance by lease and release of the estate in question was made to Mrs. Selby, the widow, who died before the son attained his age of twenty-one years, which he afterwards did at-

tain, and died in 1772, having been always in possession of the estate after the death of his mother, and having devised it to charitable uses, which devise was void by the Statute of Mortmain (a). The lessor of the plaintiff was his heir at law on the part of the mother, and the defendants his heirs at law on the part of the father's mother."

The principal opinion was delivered by Lord Mansfield. Justices Ashhurst and Buller fully concurred with Lord Mansfield, Justice Willes concurring on the ground that the action being at law the estate must be deemed to be an estate descending *ex parte materna*, but expressing the opinion that in equity a trust ought to be declared in favor of the heir *ex parte paterna*. We quote the opinion of Lord Mansfield:

"Serjeant Selby, after his purchase, was owner of the equitable estate, and had a right to go into Chancery to compel a conveyance. After his death the vendor conveyed to the widow, which conveyance on the condition of the son's living till twenty-one, and making a certain provision for her, was to be absolutely in trust for him. He outlived his mother, and on her death the trust estate was completely vested in him (the subsequent limitations in the will being on contingencies which never happened) and the legal estate descended to him from her. The question is, to whom the whole estate descended on the death of the son? for it did descend, the devise to char-

itable uses being void. If it descended from the mother, the lessor of the plaintiff takes an heir at law. But, it was contended that, though he is heir, there is a trust for the paternal heirs and it was said to be settled, that the court will not suffer a trustee to recover in ejectment, against the *cestui que trust.* When this was mentioned on the trial, I said, as I did the other day in the case of *Doe* v. *Pott* (a), that this rule is subject to the qualification of its being clearly the case only of a mere trust, for then, by taking notice of it, the court prevents delay and expense; but it will not decide when there is a doubt, but leave the question to a jurisdiction which regularly takes cognizance of matters of trust. The counsel said there might, perhaps, be cases on the subject, and the parties wished to have the opinion of the court. Now, who is to be considered as heir at law on this ejectment? It would be sufficient for the judgment which I shall deliver to say that it is not a clear case, that the lessor of the plaintiff is a mere trustee, for, that point being doubtful, he is entitled to recover at law, as he certainly has the legal right. But I will go farther, and throw out some observation, to show that it is not only doubtful, but that the inclination of my opinion is that you can not support such a trust. A case so circumstanced, in every particular, probably never existed and, perhaps, never may happen again. But, cases must often have happened on which the general question would arise, viz: Whether when *cestui que trust* takes in the legal estate possesses under it, and dies, the legal and equitable estate shall open on his

death, and be severed for the different heirs? Consider it, first, upon authority; and, secondly, upon principle. 1. No case has ever existed where it has been so held, none where the heir at law of one denomination has, on the death of the ancestor, been considered as a trustee for the heir at law of another denomination, who would have taken the equitable estate, if that and the legal estate had not united. 2. On principle, it seems to be impossible; for the moment both meet in the same person, there is an end of the trust. He has the legal interest in all the profits, by his best title. A man can not be trustee for himself. Why should the estates open upon his death? What equity has one set of heirs, more than the other? He may dispose of the whole as he pleases and, if he does not, there is no room for chancery to interpose, and the rule of law must prevail. The case in the Common Pleas is an authority, if it went on this ground, and I am told it did. There the *cestui que trust* taking the legal estate as a purchaser, the descent was altered. *Quacunque* via data therefore, the lessor of the plaintiff is entitled. If the question is doubtful then, in this court, the legal right must prevail; and if the weight of opinion and argument is that the legal estate must draw the trust after it, the case is still stronger against the defendants."

A bill in chancery was afterwards filed by the paternal heir against the maternal heir. The decision in the equity case is reported under the

style of *Selby* v. *Alston*, in 3 Ves. Jun. 339. It was held by the Master of the Rolls (Sir. R. P. Arden), following what was held to be the opinion of Lord Thurlow, (as stated in the head note): "Where the equitable and legal estates, equal and co-extensive, unite in the same person, the former merges; therefore where the former descends *ex parte paterna*, the latter *ex parte materna*, upon their union the paternal heir has no equity."

The leading American case on this question is *Nicholson* v. *Halsey*, 1 Johns. Ch. 417, decided by Cancellor Kent in 1815. It was held, as stated in the syllabus, that:

> "Where the legal and equitable estates in land, being co-extensive, unite in the same person, the equitable is merged in the legal estate, which descends according to the rules of law.
>
> "Thus, if the legal estate in fee descend, *ex parte materna*, and the equitable estate in fee, *ex parte paterna*, the equitable estate is merged in the legal, and both go in the line of descent of the legal estate.
>
> "As where A, having paid money for the purchase of land, died before any conveyance was made, and B, afterwards, took a conveyance of the land in trust for the infant daughter of A, to whom he afterwards executed a deed in fee, she was held to have acquired the legal estate by purchase; and on her death

without issue, the estate descended to her brothers and sisters of the half-blood, to the exclusion of her paternal uncle."

In the opinion of the court it is said:

"This is a claim to the inheritance made by the paternal uncle of Eliza B. Nicholson, against her brothers and sisters of the half-blood.

"The statute of descent says that brothers and sisters of the half blood shall inherit equally with those of the whole blood, unless the inheritance come by descent, devise, or gift, of some ancestor of the person dying seised, in which case all who are not of the blood of such ancestor are excluded.

"Eliza B. Nicholson died in infancy, seised in fee of a moiety of 4,000 acres of land in Chemung, and of the whole of lot No. 24, in Romulus.

"The testimony is conclusive that John Cantine, in his lifetime, conveyed to her the moiety of the Chemung lands. This conveyance was afterwards delivered back to Cantine by her mother, and new deeds taken to the infant and her mother, of the same lands, in separate and unequal portions. The first deed is supposed to have been destroyed after it was delivered up, and it cannot now be found. This subsequent surrender and destruction of that deed could not divest the infant of the estate of which she was seised under that deed, and she must have transmitted, by descent, her interest in the same, unimpaired, to her heirs at law. This is a clear and undeniable proposition; and as she is to be considered as

having acquired the legal estate by purchase the question is, whether this court can now, in aid of the heir, *ex parte paterna*, take notice of the equitable title to those lands which she inherited from her father, and which was afterwards united with the legal estate by means of the conveyance from Cantine? It may be laid down as a settled principle, that when the legal and equitable estates (being co-extensive) unite in the same person, the equitable estate is merged in the legal, and may be said no longer to exist for the purpose of being recognized and acted upon by this court. The legal estate is left to prevail according to the rules of law. The existence and truth of this principle has been frequently declared, both in courts of law and equity. Thus, in *Goodright* v. *Wells* (Doug. 771), it was acknowledged that, if the legal interest descend in fee, *ex parte materna*, and the equitable interest in fee, *ex parte paterna*, the equitable estate merges in the legal, and both follow the line through which the legal estate descends; and the court held that, after such union, the legal and equitable estates should not open on the death of the person so seised, and be severed for the claim of different heirs. The judges said there was no such case in law or equity, and there was no reason for it; for the moment both estates met in the same person, there was an end of the trust, as a man could not be a trustee for himself. And, to use the language of Lord Mansfield, 'why should the estates open at his death? What equity has one set of heirs more than the other? The legal estate draws the trust after it, and the latter is not to be revived so as to make the

heir at law of one denomination a trustee for the heir at law of another denomination, who would have taken the equitable estate, if that and the legal estate had not united. There is no room for chancery to interpose, and the rule of law must prevail.'

"The case of *Doe* v. *Pott*, cited from the C. B., was considered by the K. B. as having established the same doctrine, and to have ruled that the *cestui que trust*, taking the legal estate from the trustee, as a purchaser, thereby altered the course of descent.

"The principle advanced in the case from Douglas's Rep. was afterwards sanctioned by Lord Thurlow, in *Wade* v. *Paget* (1 Bro. 364), and by the master of the rolls in *Philips* v. *Brydges* (3 Ves. 126, 127), and again, in *Selby* v. *Alston* (3 Ves. 339). This last case arose on a bill by the paternal heir, claiming the estate as heir of the equitable title, against the heir on the maternal side, who was in possession, and claimed as the heir to the legal estate. The case is much in point, and presses strongly on the one before us. The court there held that after the union of the equitable and legal estates in the same ancestor, the former was absorbed and gone; and the bill was dismissed because the paternal heir had no equity.

"The plaintiff then, under the authority of these cases, and the principle which they so clearly and so rationally establish, has no claim to the assistance of the court in respect to the Chemung lands. There can be no doubt that the infant *cestui que trust*, by means of the conveyance from Cantine, the trustee, took the

legal estate as purchaser; and, consequently, if the legal and equitable estate, so united by that purchase, were not afterwards severed and revived by her own act, and cannot be considered as opening at her death, she must have transmitted the entire inheritance by descent to her brothers and sisters of the half blood.

* * * * * * * *

"In every view which I have been able to take of this case, I think the plaintiff fails; and his bill must be dismissed, with costs.

"Bill dismissed."

These leading English and American cases declare a rule which has been generally accepted by the American courts. The decisions of other courts on the question are collated in the notes to the case of *Hill* v. *Heard* in 42 L. R. A. (N. S.) 446, and Ann. Cas. 1914 C. 403. It is also held by the weight of authority that the course of descent of an ancestral estate may be diverted from the blood of the ancestor, so that it will descend to the heirs of the holder generally, by conveying the same to a third person, and taking a reconveyance. It is shown by these cases that upon such conveyance and reconveyance the estate is held as an estate by purchase by virtue of the reconvey ance; that this doctrine does not work a fraud upon the heirs of the blood of the ancestor, because the

holder of the estate has the legal right to sell it or give it away, thereby disappointing such expectant heirs. The cases on this question are collated in notes to the case of *Dudrow* v. *King*, in 39 L. R. A. (N. S.) 955, and Ann. Cas. 1913 E. 1259.

On the authority of the cases we have cited it is most respectfully urged that the fact that the legal title came to the heirs of Andrew J. Berryhill by conveyance from the Creek Nation and the United States is conclusive of the character of the estate as a non-ancestral estate.

As we interpret the decision of this court in *Sizemore* v. *Brady*, 235 U. S. 441, this court there treated these allotments as non-ancestral estates. Not only did the court there reject the theory of ownership of the tribal lands by the members of the tribe, either severally or as tenants in common, prior to allotment, but it was there held that under chapter 49 of Mansfield's Digest the paternal cousins took the allotment to the exclusion of the maternal cousins, who were related to the deceased in the same degree. In that case both of the parents of the deceased were Creek citizens by blood. Had this court accepted the doctrine of *Shulthis* v. *McDougal* as sound it would necessarily

have been held that the allotment went, one-half to the paternal cousins, and the other half to the maternal cousins.

Andrew J. Berryhill Having Died Prior to the Enactment of the Legislation Authorizing the Making of an Allotment to His Heirs, and No Estate, Therefore, Having Vested in Him, said Allotment was not an Acquisition, New or Otherwise, in Andrew J. Berryhill; Hence the Allotment did not Descend to his Heirs Either as an Ancestral Estate or as a New Acquisition, Under Section 2531 of Mansfield's Digest, but Vested in His Heirs, Under Section 2522 of Mansfield's Digest, by Direct Grant from the United States and the Creek Nation, Becoming a New Acquisition in Said Heirs.

Andrew J. Berryhill was born in the month of May, A. D. 1901. Not having been born until after July 1, 1900, he was not entitled to enrollment under section 28 of the Original Creek Agreement. He died in the month of November, 1901. It was not until after the death of the said Andrew J. Berryhill that provision was made for an allotment to his heirs, by section 7 of the Supplemental Creek Agreement, which was approved June 30, 1902. It is insisted, however, by plaintiff in error that the allotment made to his heirs must be treated as a new acquisition *in Andrew J. Berryhill.* We insist that this allotment was not a new acquisition in Andrew J. Berryhill, but was a direct grant by the Creek Nation and the United States to the heirs of Andrew J. Berryhill, and must therefore be treated as a new acquisition in the

heirs and not in Andrew J. Berryhill. That the grant was made to and the *acquisition* was by the heirs of Andrew J. Berryhill to us seems clear. The language of section 7 of the Supplemental Agreement is: "And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs as herein provided, and be allotted and distributed to them accordingly."

There can be no grant without a grantee, and this act does not purport to accomplish the impossible. It says that the lands shall be *allotted* to the heirs. Andrew J. Berryhill having died before the act was passed, it is clear that he had no estate thereunder, and that his heirs inherited nothing from him. They took, by virtue of the statute, an estate in lands which, until it was conveyed to them, was the property of the Creek Nation, and in which Andrew J. Berryhill had acquired no interest. We rely upon the decision in *Hall* v. *Russell*, 101 U. S. 503, and kindred cases which are sufficiently discussed in the brief of Mr. Meserve in support of our position that under the statute the heirs of Andrew J. Berryhill acquired an estate by

grant from the Creek Nation, and not by descent from Andrew J. Berryhill. It is true that the statute says that the lands shall "descend" to the heirs of the deceased allottee, but it also says that they shall be allotted to such heirs, which language clearly contemplates the conveyance thereof to the grantees by patent from the Creek Nation. The word "descend," therefore, can not be given a literal or technical interpretation.

Section 7 of the Supplemental Agreement provides that allotments made thereunder shall descend and be allotted "as herein provided." This reference is to section 6, which repeals "the provisions of the act of Congress, approved March 1, 1901, in so far as they provide for descent and distribution according to the laws of the Creek Nation," and enacts that "the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas * * * " This statute points out no particular section of chapter 49 as determining who are the heirs who shall take allotments. That is left to be determined by the application of the rules of descent prescribed by chapter 49 of the particular case. In the case at bar, if Andrew J. Berryhill was seised

of an ancestral estate, or of a new acquisition in the allotment, which a law enacted after his death provided should be made to his heirs, then it must be held that his heirs are named by section 2531 of Mansfield's Digest. We think it is clear that Andrew J. Berryhill was not seised of such lands as an ancestral estate. He had not acquired the lands, so certainly they can not be said to be a new acquisition in Andrew J. Berryhill. He had departed this life and become incapable of acquiring or taking any estate long before this allotment was selected, and even before the law was passed which authorized the making of the allotment to his heirs.

Section 2531 (Sec. 10 of Chap. 49) of Mansfield's Digest is one of the sections of the chapter which were declared by the court in *Kelly's Heirs* v. *McGuire's Heirs* to be applicable to *real estate* alone. The following excerpt from the opinion of the Supreme Court of Arkansas in that case is quoted on page 18 of plaintiff in error's brief: "The 1st, 4th, 5th, 15th, 16th, 17th and 18th sections *are the only ones* designated, in our opinion, to apply to both *real estate* and *personal estate*. All the rest embrace real estate alone."

Can it be said that Andrew J. Berryhill acquired the allotment made to his heirs as "real

estate." Section 2540 of Mansfield's Digest reads as follows: "The term 'real estate,' as used in this act, shall be construed to include every estate, interest and right, legal and equitable, in lands, tenements and heriditaments, *except such as are determined or extinguished by the death of the intestate,* seised or possessed thereof in any manner other than by lease for years and estate for life of another person." Can it be said that Andrew J. Berryhill was seised of an estate in this allotment to his heirs, which was not determined or extinguished by his death? Had Andrew J. Berryhill any rights at all in this land? This court said in *Sizemore* v. *Brady*: "There was nothing in the agreement indicative of a purpose to make a grant in *praesenti.* On the contrary, it contemplated that various preliminary acts were to precede *any investiture* of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them."

Clearly Andrew J. Berryhill had no estate and no right of any kind. If the fact that he died before the passage of the Supplemental Agreement could be ignored and it could be held that he had a "right" to have an allotment made to

him, such "right" would be "a mere float." *Woodbury* v. *United States,* 170 Fed. 302. A land certificate, for public lands in Texas, while it "symbolizes the right to acquire land, is yet but personal property." *Barker* v. *Swenson,* 66 Tex. 408, 1 S. W. 117; *Collins* v. *Durwood,* 23 S. W. 561, 4 Tex. Civ. App. 389.

Andrew J. Berryhill, having no estate at all, and certainly having no real estate, it can not be said that his heirs are to be determined under a section of the statute, which was construed by the Supreme Court of the State of Arkansas to apply to *real estate alone,* especially in view of the fact that the court declared in *Kelly* v. *McGuire* that the first section of the statute (Sec. 2522) "is to be considered as the general table of descent." The first section, it will be remembered, is one of the sections which the court declared to be applicable to personal estate as well as to real estate. This general table of descent designates the heirs of intestates generally. Section 2531 merely designates the descent of real estate, not including such interests and rights "as are determined or extinguished by the death of the intestate." Hence we can not look to this section as applicable to this case. We must look to section 1, not because

Andrew J. Berryhill had even a personal right or estate in this land, but because that section furnishes the general table of descent. If we look to the first section (Sec. 2522, Mans. Dig.) we find the table of descent which determines the heirship in this case. This section is quoted in full at page 11 of the brief of plaintiff in error.

Referring to the first section, the court said in *Kelly* v. *McGuire*, "by that section, as already remarked, real and personal estate goes in the same channel, *and if no subsequent provisions had been introduced, touching real estate,* the precise bearing of which it is probable the rivers (revisors) did not perceive, our labors would have been comparatively easy." And again in this opinion it is said: "The first section is general and comprehensive, embracing all lands, whether ancestral or newly acquired, *subject to certain exceptions* and qualifications hereafter particularly noticed, and these exceptions refer to *real estate alone.*"

In onclusion it is respectfully submited that had Andrew J. Berryhill lived to acquire an allotment it would have been a new acquisition and not an ancestral estate in him; but that, having died before he acquired an allotment or even the right to an allotment, the allotment must be held to be a

new acquisition in his heirs as grantees of the Creek Nation and of the United States; that these heirs are not determined by the application of a section of the statute having application only to the descent of estates, rights and interests in real estate, which are not determined or extinguished by the death of the intestate, but the heirs to whom the allotment inures under the statute are to be determined under the general table of descent, viz: Sec. 1 of chap. 49 (Sec. 2522) of Mansfield's Digest.

Respectfully submitted,

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